IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-1598

KENNETH HAMMOND,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Criminal Appeals of Alabama

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Petitioner, Kenneth Hammond, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Alabama, entered March 1, 1977, affirming his conviction under Title 14, §326 of the Code of Alabama (1967), that is, inciting to a felony, and that on hearing the judgment of conviction be reversed.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (App. A., *infra*, pp. A-1–A-27) has not been reported.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on March 1, 1977 (App. A., *infra*, pp. A-1–A-27). A timely petition for a writ of certiorari was filed with the Supreme Court of Alabama, and the writ was granted on June 22, 1977. After the submission of briefs and oral argument before the Court, the writ was quashed as improvidently granted on December 16, 1977. (App. B, *infra*, pp. A-28–A-33) A timely application for rehearing was filed and was overruled on February 10, 1978. (App. C, *infra*, pp. A-34–A-35)

This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the "inciting to felony" charge against petitioner was so completely devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, Title 14, §326 (a1-a4), Code of Alabama (1967); Title 14, §63, Code of Alabama (1943); and Title 15, §247, Code of Alabama (1940) are set forth in Appendix D, *infra*, pp. A-36–A-38.

STATEMENT OF THE CASE

An indictment was returned by the Grand Jury of Montgomery County, Alabama, against Kenneth Hammond on August 8, 1975, alleging, in Count I, that he

> did unlawfully incite, towit [sic]: John Moore, Rex Moore or Charles Price to a felony, towit [sic]: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammonds, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit [sic]: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit [sic]: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit [sic]: money or proceeds from or in connection with operation of certain vending machines in, towit [sic]: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of, towit [sic]: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit [sic]: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit [sic]: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

According to the literal terms of this charge, and the court's instructions to the jury, a conviction could be had if the govern-

ment proved beyond a reasonable doubt that Hammond incited either John Moore, Rex Moore, or Charles Price to commit bribery. As is briefly discussed below, these alternative charges related to widely disparate and complex factual transactions. Hammond was also accused of inciting the same persons to attempt to bribe him and with accepting a bribe, in Counts II and III of the indictment, respectively.[1] Both counts alleged the same facts as Count I and in the same manner as quoted above. (App. E, *infra*, pp. A-39–A-41)

Counsel for Hammond filed a Motion to Quash the indictment in the Circuit Court of Montgomery County, Alabama on November 10, 1975, which requested that the indictment be dismissed, alleging, inter alia, that the individual counts within the indictment failed to adequately charge an offense. Hammond's counsel simultaneously filed a Demurrer to the indictment alleging that the indictment failed to adequately set forth and inform the defendant as to the nature of the charges against him. Particularly, the demurrer alleged that the indictment was fatally insufficient because it alleged, in the disjunctive, that any one of three different individuals, were the objects of Hammond's "incitement" efforts. Both of these motions were denied by the Court at oral argument on November 25, 1975.[2]

According to the proof submitted at trial, Hammond was the president of the Alabama Public Service Commission from January, 1973 to December, 1975, and was therefore able to vote on rate increases for certain public utilities, including South Central

[1] After the defense had presented its case, and on petitioner's motion, the trial court required the State to elect one of the three counts of the indictment. The State elected Count I, and that being the count under which petitioner was convicted, this petition will be addressed only to issues relevant to Count I.

[2] There is no Alabama procedure for clarification of an indictment, such as by a bill of particulars. *Johnson v. State*, 335 So.2d 663 (Ala. Ct. App.), *cert. denied*, 335 So.2d 678 (1976).

Bell. (Tr. 540) Rex Moore and his son, John, two of the alleged "incitees" in Count I, approached Hammond in 1973 with requests that he assist them in placing vending machines in a plant owned by South Central Bell. (Tr. 167, 305) Although the Moores, who were shareholders and employees of the Tops Vending Machine Company, testified that Hammond requested payments of money in return for his assistance, there was no evidence that either of the Moores had or claimed to have any interest in South Central Bell or in the pending rate increase request, as alleged in the indictment.[3]

Hammond approached Charles Price, a vice-president of South Central Bell and the third alleged "incitee," and requested that Price do what he could to see if the Moores' machines could be installed in the plant. (Tr. 386) The Moores were notified in January, 1975, by Vernon Lockard, a South Central Bell district plant manager, that they would be allowed to install their machines in the plant, and they did so. (Tr. 309)

In February, 1975, South Central Bell filed a request for an approximately $59 million rate increase with the Public Service Commission. (Tr. 391) In June or July, 1975, Hammond spoke to Price and requested that the Moores' machines be removed because "they [were] a bunch of crooks." (Tr. 390) Hammond testified that he had reconsidered his role in the affair after discussing the Moores' offers of payments with his wife and son, and that this discussion prompted him to request that the machines be removed. (Tr. 582) Price testified that he feared Hammond might not be favorably disposed toward the proposed rate hike if the machines were not removed. At no time was there any reference to the phone company or the pend-

[3] Hammond accepted $200 from the Moores, although the purpose of this payment was unclear. Indeed, the Court of Criminal Appeals recognized that this exceedingly prejudicial evidence bore no relationship to the charges in the indictment. (App. A. *infra*, pp. A-13—A-14)

ing rate increase request. (Tr. 402) Price stated that Hammond had, in his opinion, always acted fairly with respect to the telephone company, and that he had never made any threats or promises about a rate increase. (Tr. 427)

Based on the foregoing evidence, the jury found Hammond guilty of Count I and he was sentenced to three years imprisonment. On appeal, the Court of Criminal Appeals affirmed, stating that

> [o]f the three alternatives charged in Count I, the State totally fails to prove two and barely proves the third. . . . A complex and many-faceted count is the basis for depriving [Hammond] of his liberty. We have been presented with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. . . . The evidence that [Hammond] incited Price to bribe him . . . is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.

(App. A, *infra*, pp. A-19–A-20) The Court conceded that the conviction could not be supported if Hammond demanded the withdrawal of the Moores' machines out of a desire for revenge or self-satisfaction. However, the court speculated that, although there was no evidence Hammond sought any money from Price, his insistence that the machines be withdrawn was motivated by the hope that Price would transmit his request to the Moores (who might view it as an ultimatum and pay money to Hammond). Further, since Price was concerned about the rate request, his motivation for attempting to comply with Hammond's demand was to influence Hammond's consideration of that request. (App. A, *infra*, p. A-3)

The Supreme Court of Alabama, after granting Hammond's petition for a writ of certiorari, quashed the writ as improvidently granted. Two justices dissented, arguing that the Court had in effect sanctioned a new standard of review in a criminal case—the "bare minimum" standard—and in doing so had violated Hammond's Fourteenth Amendment due process rights. (App. B, *infra*, p. A-33)

REASONS FOR GRANTING THE WRIT

1. The Court of Criminal Appeals of Alabama Departed From the Well-Recognized Constitutional Requirement That an Indictment Must Inform the Accused of the Nature of the Charges Against Him.

The Due Process Clause of the Fourteenth Amendment requires, at a minimum, that a criminal offense be charged with such certainty as is necessary to apprise the defendant of the nature of the charge against him and to protect the defendant from being put in jeopardy for the same offense in the event future action is taken against him. *Hamling v. United States*, 418 U.S. 87, 117-118 (1973); *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *See also, e.g., United States v. Hollinger*, 553 F.2d 535, 548-49 (7th Cir. 1977); *United States v. Chenaur*, 552 F.2d 294 (9th Cir. 1977). While there is no federal constitutional requirement that state court felony prosecutions be instituted by grand jury indictment, *Hurtado v. California*, 110 U.S. 516 (1884), the state must still comply with due process requirements whether it proceeds by indictment or otherwise. *Cameron v. Hauck*, 383 F.2d 966, 969 (5th Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); *Mayo v. Blackburn*, 250 F.2d 645, 647 (5th Cir.), *cert. denied*, 356 U.S. 938 (1958).

This case highlights a direct clash between the principle set forth in *In Re Confiscation Cases*, 20 Wall 92, 87 U.S. 92

(1873), and the practice approved by the Alabama court. Specifically, the federal doctrine, which is founded on the Due Process Clause, prohibits the allegation of several different acts in the disjunctive within a single count of an indictment, because such an indictment does not inform a defendant of the charges against him. *In Re Confiscation Cases, supra,* at 104. *See also, United States v. Bean,* 564 F.2d 700, 705 (5th Cir. 1977); *Price v. United States,* 150 F.2d 283 (5th Cir. 1945), *cert. denied,* 326 U.S. 789 (1946); *Troutman v. United States,* 100 F.2d 628, 631 (10th Cir. 1938); *O'Neill v. United States,* 19 F.2d 322, 324 (8th Cir. 1927); *Ackley v. United States,* 200 F. 217, 221 (8th Cir. 1912); *United States v. Malinowski,* 347 F. Supp. 347, 352 (D.C. Pa. 1972), *cert. denied,* 411 U.S. 970 (1973); *United States v. H. L. Blake Co., Inc.,* 189 F. Supp. 930, 934 (D.C. Ark. 1960); *United States v. Wells,* 180 F. Supp. 707, 709 (D.C. Del. 1959); *United States v. Mackenzie,* 170 F. Supp. 797, 799 (D.C. Maine 1959); *United States v. Dedof,* 42 F. Supp. 57 (D.C. Pa. 1941).

The Alabama court sustained a conviction on an indictment which charged multiple factual schemes, each of which could have constituted a separate crime.[4] This action violates the standards of due process set forth in *In Re Confiscation Cases, supra. See also, United States v. Hairrell,* 521 F.2d 1264, 1266 (6th Cir.), *cert. denied,* 423 U.S. 1035 (1975); *United States v. Martinez-Gonzales,* 89 F. Supp. 60 (D.C. Cal. 1950). *Compare, United States v. Anderson,* 368 F. Supp. 1253, 1259 (D.C. Md. 1973) (count charging conspiracy to extort two corporations sufficient when scheme involved a joint venture of the corporations).

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[4] Alabama has approved by statute the inclusion of alternative means for commiting a single offense within one count. Title 15, § 247, Code of Alabama (1940). The statute does not provide for the consolidation of different transactions, each of which constitutes a separate offense. For example, it is proper to allege, in a single count, murder "by cutting with a knife or shooting with a gun." *Dudley v. State,* 185 Ala. 27, 64 So. 309 (1914).

The indictment was not only invalid on its face as a matter of federal constitutional law, Hammond was in fact deprived of a fundamentally fair trial. The remaining count of this indictment presented Hammond with a bewildering choice of alternative offenses for which to prepare and present a defense. The three possible alternatives rested upon distinct theories of prosecution and distinct facts. Hammond's ability to prepare a defense was further impeded by the complexity of the ultimate theory of prosecution, which is barely cognizable even in retrospect.

Moreover, as more fully discussed below, the disjunctive allegations effectively negate the possibility of a fair review of the conviction on appeal. The disjunctive allegations in Count I not only failed to inform the petitioner of the charge against him, but allowed the jury to anonymously select one of three transactions for which to find him guilty. The Court of Criminal Appeals recognized that there was a complete lack of evidence on two of the alternatives. However, it is entirely possible that the jury convicted Hammond on the basis of one of those two grounds, *see* footnote 3, *supra,* and if so, his conviction would be invalid even under the analysis of the court below.

2. **The Court of Criminal Appeals of Alabama Breached the Due Process Clause of the Fourteenth Amendment by Concluding That Any Evidence Supported the Charge Against Petitioner.**

The Court of Criminal Appeals recognized the complete absence of any evidence to support two of the three disjunctive allegations contained in Count I, but found sufficient evidence to support the third allegation. As is discussed below, the allegation of several different transactions in the disjunctive requires that the reviewing court find sufficient evidence to support *each* of the alternatives. Further, notwithstanding the Court's conclusion that a "bare minimum" of evidence was present to support the third alternative, the conviction was "so totally devoid of evidentiary support as to render [it] void under the Due Process

Clause of the Fourteenth Amendment." *Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

According to *Turner v. United States*,

> [t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the *conjunctive* . . . the indictment stands if the evidence is sufficient with respect to any one of the acts charged.

396 U.S. 398, 420 (1970) (emphasis supplied). Application of this rule is limited, however, to conjunctive allegations of several different *means* of committing the same offense, and not to alternative expressions of different factual transactions, each of which might state a separate offense. *See, e.g., United States v. Gunter*, 546 F.2d 861 (10th Cir. 1976), *cert. denied*, 430 U.S. 947 (1977); *United States v. Jones*, 491 F.2d 1382 (9th Cir. 1974). In the instant case, Count I alleges three such separate transactions in the alternative. *See* discussion *supra* at p. 10.

Further, the rule embodied in *Turner v. United States, supra*, does not apply when acts are alleged in the *disjunctive*. As in this case, the existence of alternative accusations within a single count of an indictment renders it impossible for the reviewing court to evaluate the sufficiency of the evidence. *United States v. Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977); *United States v. Dansker*, 537 F.2d 40, 51 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964). *Compare, Hornsby v. State*, 94 Ala. 55, 10 So. 522 (1892) (general verdict of guilty is sufficient when indictment charges different *means* in the alternative).

Under the state's ultimate theory of prosecution (that is, the only theory which the Court of Criminal Appeals found to be

supportable by the evidence), Hammond sought a "thing of value" from Charles Price, rather than a $10,000 portion of the vending machine proceeds, as alleged in the indictment. No direct evidence supports this theory; the appellate court rested its decision on a finding that "Price acted on several occasions to influence [Hammond's] official actions." While the court conceded that there was no evidence that "Price was incited to pay any money to" Hammond, it concluded that the jury could have found that Hammond hoped his request would be transmitted to the Moores via Price, and that the Moores would respond by making a payment to Hammond.

This conclusion completely ignores the requirement that the state prove Hammond made this request to Price with the intent to threaten Price with adverse action on the rate increase request. *See, e.g., Rogers v. State*, 23 Ala. App. 149, 122 So. 308 (1929). Hammond denied possessing such intent. According to all of the evidence in the case, no mention was ever made by any party of the rate increase request. The appellate court concluded, however, that *Price* felt Hammond "would not look favorably on the Bell request for a rate increase if the machines were not removed." Accordingly, there is a fatal absence of a finding or any evidence to support a finding that Hammond intended to threaten Price with adverse action taken in his official capacity, with respect to the rate increase or otherwise. The verdict rendered by the jury is supported solely by conjecture, if at all. This condition is inconsistent with due process of law, and was created by the incomprehensible theory of prosecution posited by the State.

In summary, the Court of Criminal Appeals has approved a form of accusation which infected the entire proceedings below. This impermissible taint was grossly compounded by the complete absence of evidence to support the verdict returned by the jury.

Hammond submits that in view of the conflict between the federal constitutional principles which have developed relating to the charge of and proof of a criminal offense, and the purported application of those principles in the case below, review by this Court is warranted. Without such review, Hammond would be deprived of his right to a fair trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES F. NEAL
JAMES V. DORAMUS
THOMAS H. DUNDON
Counsel for Petitioner

May, 1978

APPENDIX

APPENDIX A

The State of Alabama—Judicial Department

The Alabama Court of Criminal Appeals

October Term, 1976-77

3 Div. 444

Kenneth Hammond, alias

v

State

Appeal from Montgomery Circuit Court

PER CURIAM

Appellant was indicted by the Montgomery County Grand Jury on August 8, 1975, on three counts:

(1) Inciting to a felony, bribery;

(2) Inciting to a felony, attempted bribery;

(3) Accepting a bribe.

The State elected to go to the jury on Count I only, and appellant was found guilty thereon and sentenced to three years in the penitentiary.

The State's Case

A short synopsis of the evidence against the appellant is here set out in a light most favorable to the State. The appellant was the president of the Alabama Public Service Commission

(hereinafter P.S.C.) from January 1973 to December 1975. Rex Moore and John Moore were majority stockholders in Tops Vending Machine Company (hereinafter Tops). During 1973 the Moores approached the appellant in order to solicit his help in securing the vending machine business in a South Central Bell Telephone Company (hereinafter Bell) plant on Adams Street in Montgomery. The Moores testified that the appellant then stated that he would have to receive $10,000.00 for his services. The Moores stated that they could not afford to pay that much.

In November 1974, Rex Moore received a telephone call from Mr. Vernon Lockard, an employee of Bell, about installing vending machines in the Adams Street plant. Rex Moore again met with the appellant at which time Moore said the appellant asked for $5,000.00 for his help in securing the vending machine business. Rex Moore replied that he could not afford to pay that amount. Subsequent to his conversation with the appellant, Rex Moore was informed by Mr. Lockard that Tops would not get the vending machine business at the Adams Street plant, however, in January of 1975, Mr. Lockard allowed Tops to install vending machines in that plant. The commission from the machines went to the Pioneer Club, an employee organization, not to Bell.

Charles Price was a Bell vice president in charge of public relations. Price had frequent contacts with the appellant and other members of the P.S.C. The appellant asked Price to help Tops get its vending machines into the Adams Street plant. Price complied with the appellant's request. In February 1975, subsequent to the installation of the vending machines, Bell filed with the P.S.C. a request for a rate increase of approximately $59 million. The final order concerning the rate increase was entered in September 1975 (after the arrest and indictment of the appellant). After the installation of the vending machines, Rex Moore said the appellant requested that the Moores pay him

$300.00 per month for his help in placing the machines. The Moores refused, although they did give the appellant a total of $200.00 which he requested as expense money for two State business trips.

Some months after the machines were installed, the appellant contacted Price to have Tops' machines removed, stating that the Moores were "a bunch of crooks." The appellant said Price would not get what he needed unless the machines were removed. From that Price concluded that the appellant would not look favorably on the Bell request for a rate increase if the machines were not removed. At first Price did nothing, but appellant began to pressure him more and more to have the machines removed from the Bell plant. Price finally went to the Moores and told them to settle their problems with the appellant.

Rex Moore testified that because of incessant demands for money by the appellant and because of pressure from Price to settle with appellant, he informed the Attorney General of the circumstances involved in this case. Agents of the State had Rex Moore call appellant and arrange to meet in a local truck stop restaurant on July 8, 1975. Those agents wired Rex Moore with a transmitter and recorded his conversation with appellant. Based upon Moore's complaint and the recorded conversation, a warrant for appellant's arrest was issued on July 12, 1975, and on August 8, appellant was indicted by the grand jury. The recording was admitted into evidence and played for the jury during the trial.

The Appellant's Case

The appellant testified in his own defense. It was his contention that the Moores were the instigators of the whole affair. He said Rex Moore offered him money to help place Tops' machines in the Bell plant. Appellant denied ever ask-

ing the Moores for money or accepting money in connection with placing the machines in the Bell plant. He steadfastly denied ever having implied to Price that he should put pressure on the Moores in turn for a Bell rate increase. The appellant argues at length in his brief that the Attorney General prosecuted him solely for political reasons. A number of witnesses testified as to appellant's good character.

I

Since the State elected to go to the jury on Count I only, appellant's contention that one of the other two counts was improperly amended was thereby rendered moot. Only the count upon which appellant was found guilty is subject to appellate review.

A

Among numerous motions and pleadings, on November 10, 1975, appellant filed a motion to quash the indictment. One ground set out in the motion to quash was that the grand jury which returned the instant indictment, "was not in compliance with the requirements of the laws of the state of Alabama in obtaining the general cross-section of the community. . . ."

The State contends that the Montgomery County Jury Commission, acting under a federal court order, was required to fill the jury box by taking every fifth name from the voting list of Montgomery County. Appellant contends that such a system fails to fully comply with Alabama statutes on establishing jury lists. The testimony did establish that every fifth name was selected from a computer printout of the Montgomery County voters list.

In support of its position, the State cites *Higginbotham v. State*, 54 Ala.App. 633, 312 So.2d 31 (1975). In *Higginbotham*, the venire was established pursuant to a federal court order relating to the Lowndes County Jury Commission. There, the federal court required the commission to examine not only the voters list of that county, but also the tax assessor's list and the list compiled by the federal examiners, and make up a comprehensive list therefrom. The testimony in that case showed that the Lowndes County Jury Commission complied with the requirements of the federal court order and in addition thereto used every source of names available to them in Lowndes County in compiling the master list. The testimony showed that everyone twenty-one years and older were included on the list. The commission also evaluated each precinct in the county and talked to persons having knowledge of individuals living in the county for the purpose of removing ineligible persons as jurors according to the jury laws of this state.

In the instant case, the Montgomery County Jury Commission in following the federal court order ignored the state law. In the memorandum opinion issued in *Penn et al. v. Eubanks et al.*, Judge Frank Johnson, Jr., on June 6, 1973, stated, "As for the means of selecting this cross-section, this court *commends for the jury commission's consideration* the random jury selection plan used in all federal district courts and in many state courts. See Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1865." (Emphasis supplied.) That court's order stated that, "The jury commission shall examine the voting list and make an alphabetical list therefrom . . ." That order did not go as far as the one issued in *Higginbotham* in allowing the use of other sources in selecting potential jurors.

Judge Johnson's order and opinion relating thereto, set a minimum standard which the Montgomery County Jury Commission must meet in order to comply with federal constitutional provisions. We do not read his order to mean that the jury commission is to completely ignore the statutory requirements of

Alabama law in selecting and qualifying jurors. Alabama law, if administered in good faith, provides a much better cross-section of the community for jury selection than the federal system.

In *Higginbotham*, supra, the Lowndes County Jury Commission complied with both federal and state standards. In the instant case, the Montgomery County Jury Commission meets only the minimum federal requirements and thus violates the requirements of Title 30, § 21, Code of Alabama 1940 as amended. However, the violation of a statutory requirement in filling the jury roll may *not* be taken advantage of by a motion to quash. Title 15, § 278 and Title 30, § 46, Code of Alabama 1940. The only exceptions to the prohibitions of these sections is in case of (1) denial of a constitutional right or (2) fraud.

In addition to the motion to quash the indictment, on October 30, 1975, appellant had filed a plea in abatement to the indictment. Ground 3 is as follows:

> "That the grand jury which returned the indictment against the defendant was not in compliance with the requirements of the laws of the state of Alabama in obtaining the general cross-section of the community, in that upon the information and belief, the venire from which the grand jury was drawn, was taken by a mere selection of each fifth name on the jury list[1] of Montgomery County."

We must now determine if the question of fraud was properly presented in the trial court below and whether an erroneous ruling was made thereon by the trial court.

Gregg v. Maples, 286 Ala. 274, 239 So.2d 198 (1970) holds that a system of jury selection which excludes persons who are not registered voters would not substantially comply with statu-

[1] "Jury list" as used in the plea in abatement is apparently a typographical or clerical error, since all the argument before the trial court and on appeal on this point refers to selection of every fifth name from the "voters list." All parties and the trial court treated the plea as an objection to selection from the *voters* list.

tory requirements that the jury roll contain the names of every citizen living in the county who are generally reputed to be honest, intelligent and esteemed in the community for integrity, good character and sound judgment. In the *Gregg* case, the Alabama Supreme Court held that the method of selecting and compiling the jury roll in Madison County, making sole use of the voter registration list, is a *fraud in law*. To quote from *Gregg*:

> ". . . Fraud used in this sense has been construed as encompassing more than criminal wiles: 'Fraud is a relative term, it includes all acts and omissions which involve a breach of legal duty injurious to others.' Inter-Ocean Cas. Co. v. Banks, supra [32 Ala.App. 225, 23 So.2d 874]. And it has been held that 'When it affirmatively appears that the names of a large number of citizens who possess the qualifications required by law of jurors, are intentionally omitted from the jury roll * * * that is a fraud in law that requires the quashing of a venire * * *. It is not the kind of a jury box contemplated by law. Our statutes do not contemplate * * * any system or scheme of selecting other than the selection of names authorized by law * * *.' 32 Ala.App. at p. 227, 23 So.2d at p. 875, citing Doss v. State, 220 Ala. 30, 123 So. 231."

In *Fikes v. State*, 263 Ala. 89, 81 So.2d 303 (1955), the appellant there filed a motion to quash the indictment on the ground of systematic exclusion. The Alabama Supreme Court set out at length the procedure used in Alabama for compiling jury lists. It went on to hold that "there is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, *in the absence of fraud* (or a denial of constitutional rights) . . ."

Fikes was cited by the appellee in *Gregg v. Maples*, supra, as justification for excluding persons not on the voters list. In the

Gregg case, the Alabama Supreme Court pointed out that *Fikes* is a proper statement of the law, except that the appellee had ignored the phrase, "in the absence of fraud . . ."

In *Bell v. Terry*, 213 Ala. 160, 104 So. 336 (1925), the Alabama Supreme Court held that the indictment in that case should not be quashed, *except on a plea in abatement*, sustained by proof that the grand jurors who found the indictment were not drawn by an officer designated by law to draw the same, or that the jury commissioners *fraudulently filled the jury box*.

In *Reese v. State*, 228 Ala. 132, 152 So. 41 (1933), the Alabama Supreme Court held that under our procedural statute (Title 15, § 278, of the present Code), a motion to quash the indictment was not the proper method of presenting questions going to the formation of the grand jury. Such could only be raised by a plea in abatement.

In *Thomas v. State*, 277 Ala. 570, 173 So.2d 111 (1965), the Alabama Supreme Court held that a motion to quash is the proper way to challenge an indictment and trial venire on grounds of intentional racial discrimination. The Court stated:

> "Sections 278 and 285, Title 15, and § 46, Title 30, Code 1940, have been held to be *procedural* statutes, designed to prevent quashing of indictments or venires for *mere* irregularities and to obviate the resulting delays in the administration of justice. Those statutes do not deny to one charged with a crime the right to present for a determination the question of whether the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States have been violated. Vernon v. State, 245 Ala. 633, 18 So.2d 288 . . ." (Emphasis supplied.)

Citing *Bell v. Terry*, supra, this Court in *Mullins v. State*, 24 Ala.App. 78, 130 So. 527 (1930) stated:

> ". . . We conclude from the holding in this case that, notwithstanding sections 8630 and 8637, Code of 1923, fraud in filling the jury box may be taken advantage of either by motion to quash the venire or by plea in abatement to the indictment containing proper averments, supported by proof that the jury box was fraudulently filled . . ."

Sections 8630 and 8637 are found in the present Code as Title 15, § 278 and Title 30, § 46, respectively.

In *Spivey v. State*, 172 Ala. 391, 56 So. 232 (1911), the Supreme Court of Alabama found that where the record affirmatively shows an error was committed by the trial court in the organization of the grand jury, which is fatal to the judgment, on an indictment found by such grand jury, an objection thereto may be taken by a motion in arrest of judgment and also by motion to quash. The Court in that case stated:

> ". . . The jury law has for a long time provided that no objection can be taken to any venire *except for fraud* in the drawing or summoning; yet this objection could not be taken to an indictment, if the grand jury was drawn in the presence of and by the officers designated by law; that is, this question could not be inquired into on a plea in abatement, nor on motion to quash an indictment, if the grand jury was drawn in the presence of, and by officers designated by law . . ."
>
> * * * * * * *
>
> "In case the error is apparent of record, and is fatal, and goes to the organization of the grand jury which found and returned the bill, the objection is availing on motion in arrest of judgment, or by motion to quash; otherwise by plea in abatement.—*Ramsey v. State*, 113 Ala. 49, 21 South. 209; *Peters v. State*, 98 Ala. 38, 13 South. 334."

In considering the applicability of *Gregg v. Maples*, supra, we make the following observations:

(1) *Gregg v. Maples* arose from a petition for writ of mandamus to reconstitute the jury roll, not from a motion to quash an indictment.

(2) The Montgomery Jury Commission was acting under federal court order stating that, "The jury commission *shall* examine the voting list and make an alphabetical list therefrom . . ." (Emphasis supplied.)

(3) Failure to comply with the state statutes, detailing the composition of the jury roll, is not a denial of a constitutional privilege.

(4) As it relates to composition of grand juries, the fraud necessary to quash an indictment is construed by us to encompass only willful and deliberate omissions of persons eligible to serve which would result in some demonstrable prejudice to the appellant.

To us there is a great difference between the body that merely accuses, via indictment, and the body that determines guilt or innocence. The requirements of due process and equal protection are more strictly observed in the trial phase (finding of guilt or innocence) than in the accusatory proceedings. For instance, in grand jury proceedings the accused has no right to be present, to confront witnesses, to cross-examine or to be represented by counsel, as he does at trial.

While grand juries and petit juries are drawn from the same jury lists, it is more important that an accused have the right to a much broader inquiry as to how the trial jury was selected than how his accusers were impaneled. There is no challenge to the petit jury composition on the grounds of fraud in the instant case. In light of Title 15, §§ 278, 285, we will not extend the rationale of *Gregg v. Maples*, supra, to apply to the

instant challenge of the grand jury. We hold to the rationale expressed in *Higginbotham*, supra. If the application of "fraud in law" as expressed in *Gregg v. Maples*, is extended to challenges of grand juries by motions to quash, it must be done by the Supreme Court, not by this Court.

Here, the appellant has failed to demonstrate how he was prejudiced by an indictment returned by a grand jury drawn from a list containing names of 6,070 voters of Montgomery County. Prejudice in jury selection (grand or petit) must be established by the appellant. *Johnson v. State*, Ala.Cr.App., 335 So.2d 663, cert. denied Ala., 335 So.2d 678 (1976).

As to exclusion of nineteen and twenty year olds from the jury roll, we have previously disposed of that argument in favor of the State in *Giddens v. State*, Ala.Cr.App., 333 So.2d 615 (1976). Also see: *Bowens v. State*, 54 Ala.Cr.App. 491, 309 So.2d 844 (1975).

II

The appellant moved to exclude the State's evidence at trial, arguing that a fatal variance existed between the indictment and the proof produced. The appellant now contends the trial court erred to reversal in denying his motion to exclude. The indictment was, to say the least, complex. Count I of the indictment, upon which the verdict of guilty was based, was drawn by using a combination of two statutes, since no Code form existed for the specific offense charged.

Act No. 232, Acts of Alabama 1967, approved August 16, 1967 (Title 14, §326(a)(1)-(a)(4), Code of Alabama, 1973 Cumulative Pocket Part) establishes the crime of inciting to a felony. The specific felony which Count I alleges that the appellant incited is bribery (Title 14, § 63, Code of Alabama 1940). Count I charges:

"The Grand Jury of Said County charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias 'Bozo' Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias 'Bozo' Hammond, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit: money or proceeds from or in connection with operation of certain vending machines in towit: South Central Bell Telephone Company buildings; Montgomery, Alabama, in the amount of, towit: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase required by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition For Approval Of New Schedules Of Rates And Charges For Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama."

The State drafted the indictment and is bound by its wording. It charges incitment to bribery by three alternatives alleged in the disjunctive. We summarize Count I of the indictment as charging that the appellant incited, Rex Moore, **or** John Moore, **or** Charles Price to:

(1) Corruptly offer, promise or give;

(2) To appellant as an executive, legislative or judicial officer;

(3) A gift, gratuity, or thing of value;

(4) With intent to influence appellant's vote;

(5) On a pending Bell rate increase.

A major problem in testing Count I against the appellant's allegation of variance, is the use of the disjunctive, "or." When criminal conduct is alleged in an indictment in the disjunctive, we must view the proof against each disjunctive allegation separately.

We summarize the elements of bribery, enumerated in Title 14, § 63, as follows:

(1) To corruptly offer, promise or give;

(2) To any executive, legislative or judicial officer;

(3) Any gift, gratuity, or thing of value;

(4) With intent to influence his act, vote, opinion, decision or judgment;

(5) On any cause, matter or proceeding then pending or which may be brought before such officer in his official capacity.

A

The first two alternatives of Count I are not sustained by the proof. Although the jury could reasonably find that appellant incited the Moores to offer him money, there is absolutely no proof that the offer was for the purpose of influencing appellant's vote on the Bell rate request. There was not one iota of evidence that the Moores had any interest whatsoever in

the rate request. The Bell rate request was never mentioned in any conversation between appellant and the Moores. If Count I is sustained by the proof, it must be on the third alternative concerning Charles Price.

B

It is clear that Price acted on several occasions with the intent to influence appellant's official actions as such actions related to Bell's business. However, there is no evidence that Price was incited to pay any money to appellant. For Count I to stand as it relates to Price, the evidence must prove that appellant incited Price to give him, "a gift, gratuity or thing of value" in order to influence appellant's vote on the rate request. The question then is whether the doing of an act may constitute the giving of a thing of value, within the meaning of the bribery statute.

"A gift or gratuity will not support an indictment for soliciting or accepting a bribe unless the thing requested or accepted was something of value to the person seeking or obtaining it." However, the doing of an act which will ultimately result in a payment being made to the appellant is considered a thing of value in the law. *Commonwealth v. Hayes*, 311 Mass 21, 40 N.E.2d 27, 31 (1942); *Commonwealth v. Hurley*, 311 Mass. 78, 40 N.E.2d 258 (1942).

12 Am.Jr.2d, Bribery, § 7, states:

> "It seems that a bribe must involve something of value that is used to influence action or nonaction. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced."

It was held in Ohio in *Scott v. State*, 107 Ohio St. 475, 141 N.E. 19 (1923), that it is impossible to establish value which is universal, and further that, "the test of the value must necessarily be the desire of some person or persons not necessarily of most persons or all persons, for the thing in question."

We held in *McDonald v. State*, 57 Ala.App. 529, 329 So. 2d 583, cert. quashed 295 Ala. —, 329 So.2d 596 (1975), that giving or promising to give sexual favors in exchange for official action was a sufficient thing of value to support a charge of bribery.

11 C.J.S., Bribery, § 2, p. 845, states:

> "In order to constitute the offense there must be the promise, gift, or acceptance of money or other thing of value, not necessarily of pecuniary or intrinsic value, but value in the sense of a personal advantage of some sort to be derived by the recipient." (Footnotes omitted.)

In *Caruthers v. State*, 74 Ala. 406 (1883), our Supreme Court held that the promise of a defendant to a juror to chop cotton for a week if the juror would clear him constituted a gratuity or a thing of value. The Court stated:

> "The substance of the offer or promise proved to have been made by the defendant to the juror, Bell, was that he would '*chop cotton* a week,' if the juror would clear or acquit him. This, in our opinion, was 'a gift, *gratuity*, or *thing of value*,' within the meaning of the statute. The word *thing* does not necessarily mean a *substance*. In its more generic signification it includes an act, or action. So, the word gratuity embraces any recompense, or benefit of pecuniary value. . . . The evil of the offense is its tendency to pervert the administration of justice, by tempting jurors to act contrary to the known rules of honesty and integrity. The promise of the de-

fendant to give his *labor* or *services*, as a reward for the corrupt violation of the juror's sworn duty, is a 'gift, gratuity, or thing of value,' within the signification of the statute."

A similar explanation is found in *Commonwealth v. Albert*, 310 Mass. 811, 40 N.E.2d 21, 26 (1942):

> "The promise to do an act that would result in a pecuniary gain to the defendant would undoubtedly come within the scope of the statute. . . . It is enough if a reward or personal advantage will accrue to the officer for the performance of the act and that he considers the value of that which he will receive so highly as to permit it to influence his official conduct. . . . Of course, if all the officer intended from the performance of the act was the self-satisfaction from the fact that he is empowered to command obedience or the sentiment that comes from conferring a kindness upon another, then he would not receive anything to which the law would attach value. . . ."

If appellant, in ordering Price to have the machines removed, was acting out of revenge, or for the self-satisfaction he would receive by punishing the Moores for not meeting his earlier demands, then "he would not receive anything to which the law would attach value." However, the jury heard the witnesses and observed their demeanor. They listened to the testimony of the Moores, Price and of the appellant. "It could properly be found upon the evidence, together with the inferences which need not be necessary or unescapable so long as they are reasonable and warranted that it had been proved beyond a reasonable doubt," that the appellant intended that his threat, transmitted through Price, would cause the Moores to give in and pay him money. *Commonwealth v. Albert*, supra. Price's action could thus be considered "a thing of value" to appellant.

C

Appellant contends that he is not an executive, legislative, or judicial officer within the meaning of the bribery statute and, therefore, could not legally be convicted under Count I of the indictment. The Constitution of Alabama 1901 sets out the members of the executive, legislative and judicial departments, respectively in Article 5, § 112, Article 4, § 44 and Article 6, § 139, et seq. Neither the P.S.C., nor the position of president of the P.S.C. is listed in the above articles of the Constitution. However, the State contends that appellant comes within the purview of the bribery statute because, as president of the P.S.C., he performed executive, legislative and judicial *functions*.

We find no Alabama cases directly in point, however, we are persuaded by authority of cases from a number of other jurisdictions.

Most persuasive is *Weil v. Black*, 76 W.Va. 685, 86 S.E. 666 (1915). There, the Supreme Court of West Virginia, in interpreting a bribery statute similar to Alabama's held that a member of the Public Service Commission was a legislative or judicial officer within the meaning of that statute. The State quoted in its supplemental brief what we believe to be the heart of the reasoning expressed in *Weil v. Black*:

> "Members of the public service commission are included in the descriptive terms of the above statute 'any executive or judicial officer.' Those are general terms, intended to include all public officers whose duties are either judicial or executive. The term 'executive' is not there limited to the officers enumerated in section 1, art. 7, of the Constitution, as constituting the executive department of the state government, but it is designed to embrace all officers, whether elected or appointed, whose duties pertain to that branch of

the government. Being public officers, whose jurisdiction extends over the whole state, it necessarily follows from the apportionment by the Constitution of all the powers of government among three departments, denominated therein as the legislative, the executive, and the judicial departments, that the duties of all public officials must fall within some one of those three departments. A fourth department, having powers distinct from the three named, could not constitutionally exist. That the public service commissioners are not included in the terms 'members of the Legislature,' must be admitted; that they are included in one or the other of the terms 'executive or judicial officers' we think is clear, and it is sufficient, for the purposes of this writ of error, to class them under the head of executive officers. If their duties are so varied that some of them may properly be classed as executive or ministerial, and others as judicial, they could, for the purposes of the bribery statute, be classed under either of the two departments. In so far as they are empowered to investigate rates and charges of public service corporations, and to determine their reasonableness or unreasonableness, they would seem to be performing a quasi judicial function, while, in ascertaining what is a just rate for services to be rendered by such corporations, and prescribing such rate, as a rule to be obeyed in the future, their action would seem to partake somewhat of a legislative character; and in compelling obedience to its orders, by proper proceedings in court, as section 5 of the act creating it requires it to do, its duties are ministerial coming clearly within the functions of the executive department of government."

We take judicial notice that there are scores of officers not listed in the Constitution under any one of the three branches of government. We do not construe this circumstance to have created a fourth branch of government. As stated in *Peoples v. Salsbury*, 134 Mich. 537, 544, 96 N.W. 936 (1903):

"The scheme of our government divides all governmental functions into three classes of powers, viz., the legislative, the executive, and the judicial; and the officers who perform these respective functions must be included in the three classes of officers who exercise these powers. It is difficult to conceive of an officer exercising any of the powers of government not being within one of these classes; and when, an officer cannot be classed with the legislative or judicial, he must come within the executive class, for, in a sense, all officers execute the laws . . ."

Of similar import are: *Davis v. State*, 70 Tex.Cr.R. 524, 158 S.W. 288 (1913); *State v. Womack*, 4 Wash. 19, 29 P. 939 (1892); *Sheely v. People*, 54 Colo. 136, 129 P. 201 (1913); *State v. Emory*, 55 Ida. 649, 46 P.2d 67 (1935).

While appellant, as president of the P.S.C., was certainly not a member of the legislature, he still performed legislative functions since ratemaking is such a function which could be exercised by the legislature or delegated by it to the P.S.C. See: *Walker v. Alabama Public Service Commission*, 292 Ala. 548, 297 So.2d 370 (1974); *Murray v. Service Transport, Inc.*, 254 Ala. 683, 49 So.2d 221 (1950); *State v. Southern Bell Telephone and Telegraph Company*, 274 Ala. 288, 148 So.2d 229 (1962).

Although Article 5, § 112, does not list members of the P.S.C. as being members of the executive department, it could not be seriously argued that such officers do not perform duties normally associated with the executive branch of government. Therefore we find that appellant, as president of the P.S.C., was an executive, legislative or judicial officer within the meaning of our bribery statute, Title 14, § 63, supra.

Of the three alternatives charged in Count I, the State totally fails to prove two and barely proves the third. While the evi-

dence at the trial may prove a series of highly questionable transactions between appellant, Price and the Moores, for the purpose of this appeal, such conduct can only be viewed in the context of the statute and the specific wording of the indictment. A complex and many-faceted count is the basis for depriving appellant of his liberty. We have been presented with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. When the task is completed, we find only one theory from which a jury could draw an inference of guilt. The evidence that appellant incited Price to bribe him, pursuant to the wording of Title 14, § 63, is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.

III

As one ground of his motion to quash the indictment, appellant complains that he was denied a fair trial due to prejudicial pretrial publicity. Appellant proved, through witnesses, that there was substantial pretrial publicity. He did not, however, prove that it prejudiced his right to a fair trial. The voir dire examination of the jury panel shows no prejudicial effect upon the jury resulted from the publicity. We find no error on the part of the trial court in its ruling against the appellant in this regard. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Mathis v. State*, 52 Ala.App. 668, 296 So.2d 755 (1973) cert. quashed 292 Ala. 732, 296 So.2d 764; *Gray v. State*, 56 Ala.App. 131, 319 So.2d 750 (1975); *Yeomans v. State*, 55 Ala.App. 160, 314 So.2d 79 (1975).

IV

Appellant contends that the trial court erred in refusing to grant his motion to produce certain evidence presented to the grand jury. He likewise contends that there was no legal evidence before the grand jury. The record reflects that Rex Moore and John Moore testified before the Grand Jury which indicted appellant. It has long been law in Alabama that where it appears that witnesses were examined before the grand jury, inquiry into the sufficiency of the evidence there presented is not permitted. *Loyd v. State*, 279 Ala. 447, 186 So.2d 731 (1966); *Washington v. State*, 63 Ala. 189 (1879). See also: *State ex rel. Baxley v. Strawbridge*, 52 Ala.App. 685, 296 So.2d 779 (1974); *Bowens v. State*, 54 Ala. App. 491, 309 So.2d 844 (1974). We find no error in the trial court's refusal to open the grand jury records to appellant. *Thigpen v. State*, 49 Ala.App. 233, 270 So.2d 666 (1972).

Neither was appellant denied a constitutional right when the State nol prossed the charges in the county court immediately prior to his preliminary hearing and then proceeded in circuit court by way of indictment. It has long been held that an accused has no absolute right to a preliminary hearing in Alabama after an indictment has been returned by the grand jury. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970); *Campbell v. State*, 278 Ala. 114, 176 So.2d 242 (1965); *Johnson v. State*, Ala.Cr.App., 335 So.2d 663 (1976), cert. denied Ala., 335 So.2d 678.

V

The appellant contends that the trial court erred in admitting into evidence the tapes and transcripts of conversations between the appellant and Rex Moore. The tapes were obtained without a warrant, which the appellant contends violates the United States and Alabama Constitutions.

A

A review of the so-called "bugged agent" cases leads us to the inescapable conclusion that the lack of a warrant in this case did not violate the Fourth Amendment to the United States Constitution. *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966); *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971). The above cases are also persuasive authority regarding the interpretation of the Alabama Constitution, but they are not binding.

Article 1, § 5, Constitution of Alabama 1901, reads as follows:

> "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

Recently the Supreme Court of Michigan was faced with a case very similar to the case before us. There, a law enforcement officer, without a warrant, simultaneously monitored a conversation between a defendant and an informant. The defendant contended that the law enforcement officer's testimony concerning the conversation should have been excluded under the Michigan Constitution. The Michigan Supreme Court agreed and held that a search warrant should have been issued prior to the institution of the participant monitoring procedure. *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975).

Article 1, § 11, Constitution of Michigan 1963, which is almost identical to the aforementioned provision in the Alabama Constitution, reads as follows:

> "The persons, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrants to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. . . ."

While we express no opinion as to the efficacy of the above argument, we believe it is worthy of consideration. Especially noteworthy is the following statement from *Beavers:*

> "Participant monitoring is practiced extensively throughout the country and represents a vitally important investigative tool of law enforcement. Equally significant is the security and confidence enjoyed by our citizenry in knowing that the risk of intrusion by this type of electronic surveillance is subject to the constitutional protection against unreasonable searches and seizures. By interposing the search warrant requirement prior to engaging in participant monitoring, the risk that one's conversation is being intercepted is rightfully limited to circumstances involving a party whose conduct has provided probable cause to an independent magistrate to suspect such party's involvement in illegal activity. The warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather a procedure which guarantees a measure of privacy and personal security to *all* citizens. The interests of both society and the individual should not rest upon the exercise of the unerring judgment and self-restraint of law enforcement officials. Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society."

The State contends that a warrant is not required to surreptitiously record a conversation if one of the parties is a will-

ing participant in the recordation procedure. The State cites *Alonzo v. State ex rel. Booth*, 283 Ala. 607, 219 So.2d 858 (1969) as being dispositive of the issue. We do not agree. *Alonzo* appears to be clearly distinguishable on its facts. In *Alonzo* it was held that a warrant was not necessary in order for a *private citizen* to record telephone conversations in which he participated. In the present case, as in *Beavers*, supra, the police *instigated, encouraged*, and *participated* in the recording operation. *Alonzo* discloses no such police involvement.

The constitutionality of warrantless recording operations, which are instigated by law enforcement officers, must ultimately be based on public policy considerations. These policy considerations, which include numerous intangible factors, are adequately set out in *On Lee, Lopez, Osborn, White*, supra, and the vigorous dissents thereto. Also see: Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349 (1974); Kamisar, LaFave and Isreal, *Modern Criminal Procedure*, pp. 416-60. By the proceeding [sic] digression, we should not be construed to imply that the law enforcement agencies of Alabama have acted in any way inconsistent with the Alabama Constitution. We merely point out that the constitutionality of the use by the State of "bugged" agents, absent a warrant, has not been conclusively decided under the Alabama Constitution by our Supreme Court.

Based upon the federal decisions cited above, and based upon the very slight analogy *Alonzo* affords (see dissent, relying upon *Lopez*, supra) we find that no constitutional duty was breached by the failure of officers to obtain a warrant to tape record appellant's conversation with Rex Moore in the instant situation.

B

The electronic tape recording of the July 8, 1975, conversation between Rex Moore and appellant was introduced into

evidence over vigorous objection, as was the stenographic transcript of the recording. That transcript was typed by a secretary in the Attorney General's Office under the direct supervision of one of the investigators who overheard the conversation as it was being recorded. It was authenticated by both. See: *People v. Albert*, 6 Cal.Reptr. 473, 182 C.A.2d 729 (1960).

Appellant contends the recording contained inaudible portions and that the typed transcript furnished by the State supplied words which were not audible on the tape. We have carefully listened to the recording and compared it to the State's transcript, and there are inaudible portions in the tape where words or phrases are supplied in the typed transcript. They are, however, minor in nature and served to only cast slight doubt upon the weight which should be given the recording by the jury. See: *Tumminello v. State*, 10 Md.App. 612, 272 A.2d 77 (1971).

Because the recorded conversation took place in a popular truck stop restaurant, the recording is replete with background noise of dishes clattering, customers and waitresses conversing, a baby crying, and the muffled roar of truck engines. Rex Moore's voice and his foul language come in loud and clear, as he had the microphone on his person. The appellant's voice is faintly heard for the most part, and altogether unheard in other parts. The tape recording is of poor quality and, without the Attorney General's transcript to follow as it is played, the recording would shed very little light on the transaction, other than showing that Moore and appellant met and discussed something.

The question before us is whether admission of the recording and transcript violated any rules of evidence. We think not. First, the recording was played outside the presence of the jury for the circuit judge. Both sides had an opportunity, *in camera*, to point out objections to the recording or explain away ambiguities. *Boulden v. State*, 278 Ala. 437, 179 So.2d 20

(1965); *Wright v. State*, 38 Ala.App. 64, 79 So.2d 66 (1954). Secondly, the trial judge, after review, ruled the recording and transcript were admissible for whatever weight the jury wished to give them; a ruling which is subject to our limited review only as to abuse of discretion. Thirdly, the recording was not the only evidence offered, and other witnesses corroborated the substance of the conversation recorded. *Wright*, supra. Fourthly, the appellant testified that the recording was basically true and correct. We, therefore, find the recording and transcript thereof to be admissible for whatever weight they may have been accorded by the jury. *Lykes v. State*, 54 Ala.App. 7, 304 So.2d 249 (1974).

VI

There was no exception or objection to the trial court's oral charge to the jury. The trial judge refused eleven written requested charges proposed by the appellant, and gave twenty-five. We have carefully examined each of the refused charges and find they were either affirmative in nature, and thus properly refused under the evidence, or were incorrect statements of applicable law, abstract in nature under the evidence, or fully and substantially covered in the given charges or in the court's oral charge. No error resulted in their refusal. Title 7, § 273, Code of Alabama 1940; *Lebo v. State*, 55 Ala.App. 624, 318 So.2d 319 (1975).

We have reviewed the record, consisting of six volumes containing 323 pages of pretrial testimony on motions and pleadings and 723 pages of testimony on the merits and trial court records. We have also examined the numerous exhibits accompanying the record. The appellant raised 58 issues in his original brief and reply brief which have been considered by this Court. After receipt of briefs, we directed that supplemental briefs be filed expanding on three crucial issues. Those issues have been addressed in this opinion along with certain other issues raised by appellant which merited serious consideration. Our review convinces us that, although many close questions of law arose, the trial court committed no error prejudicial to the appellant.

AFFIRMED.

All the Judges concur except Harris, J., concurs in the result only. Bowen, J., not sitting.

APPENDIX B

The State of Alabama — Judicial Department

The Supreme Court of Alabama

October Term, 1977-78

Ex parte: Kenneth Hammond

Petition for Writ of Certiorari to the Court of Criminal Appeals

(In Re: Kenneth Hammond

S. C. 2515 v.

State of Alabama)

Beatty, Justice.

The petition for writ of certiorari to the Court of Criminal Appeals is quashed as improvidently granted.

Writ Quashed.

Torbert, C. J., Bloodworth, Maddox, Jones, Almon and Shores, JJ., concur.

Faulkner and Embry, JJ., dissent.

Faulkner, Justice (dissenting).

By quashing the writ the majority of this court lets stand the judgment of the Court of Criminal Appeals. I would reverse and remand because, in my opinion, Hammond has been denied due process of law, under the 14th Amendment to the Constitution of the United States.

Kenneth Hammond, while serving as a Commissioner on the Alabama Public Service Commission was indicted for inciting to a felony-bribery. Under Count 1 of the indictment the case went to the jury, charging Hammond in the disjunctive with inciting Rex Moore or John Moore of Tops Vending Company, or Charles Price of South Central Bell Telephone Company, to:

1. Corruptly offer, promise or give
2. To Hammond as an executive, legislative or judicial officer;
3. A gift, gratuity, or thing of value, to-wit money or proceeds from or in connection with the operation of certain vending machines in, to-wit South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of to-wit $10,000;
4. With intent to influence Hammond's vote, opinion, decision or judgment on a cause, matter or proceeding pending before him in his official capacity as President, Public Service Commission, to-wit a telephone rate or charge increase requested by South Central Bell Telephone Company.

Hammond was convicted by a jury, and the trial court sentenced him to three years in the penitentiary. On appeal to the Court of Criminal Appeals, affirmed. We granted certiorari on the alleged ground of whether Hammond received constitutional due process of law by being convicted without substantial evidence on all elements of the crime to support the conviction. The majority did not write an opinion giving their reasons for affirmance, yet it is obvious that the Court of Criminal Appeals had grave doubts about this case. The court said:

"A complex and many-faceted count is the basis for depriving appellant of his liberty. We have been presented

with a hodge-podge of facts and are told that upon one theory or another, they substantially prove every material allegation of the indictment. In order to find one theory or one alternative which would support the instant conviction, it has been necessary to fit facts together like connecting pieces of a complex jigsaw puzzle. When the task is completed, we find only one theory from which a jury could draw inference of guilt. *The evidence that appellant incited Price to bribe him, pursuant to the wording of Title 14, § 63, is far from overwhelming. Yet, we find it to be sufficient to meet the bare minimum standards to support the verdict of the jury.*" (Emphasis added.)

Further, the court said:

"The first two alternatives of Count 1 are not sustained by the proof. Although the jury could reasonably find that appellant incited the Moores to offer him money, there is absolutely no proof that the offer was for the purpose of influencing appellant's vote on the Bell rate request. There was not one iota of evidence that the Moores had any interest whatsoever in the rate request. The Bell rate request was never mentioned in any conversation between appellant and the Moores. If Count 1 is sustained by the proof, it must be on the third alternative concerning Charles Price."

The majority, by quashing the writ, agrees with the Court of Criminal Appeals. By doing so, they have introduced a new standard of evidence to support a conviction—bare minimum standards—in the field of criminal law. This is a dangerous departure from the substantial evidence rule, and the "bare minimum standards" violate Hammond's constitutional rights. In Ex Parte Grimmett, 228 Ala. 1, 152 So. 263 (1963) this court held that *there must be substantial evidence to prove all the elements of the charge*. The scintilla rule of evidence applicable in civil cases does not apply to criminal cases because the presumption of innocence, shielding every prisoner at bar, is not overcome by a mere scintilla of evidence.

Here, there was no evidence at all that Hammond was offered, promised, or given any gift, gratuity, or thing of value to influence his vote on a pending rate case. This court held in *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So. 2d 456 (1965) that *it is a violation of due process of the 14th Amendment to the Constitution of the United States to convict and punish a person without any evidence at all of his guilt*. Where is there any evidence at all of guilt here that Hammond incited Charles Price to bribe him to vote favorably on a pending rate case?

Price testified that in 1974, Hammond told him that he had friends in the vending machine business and wanted to know whether machines could be put in some of Bell's buildings. He and Hammond discussed, on several occasions, whether the machines (Moore's machines) had been placed in Bell's buildings. Finally, the machines owned by Moore were placed in the buildings in January, 1975. Two or three months later, he testified, Hammond told him to take out the machines. On direct examination Price testified:

"Q. Did you bring the subject up about these vending machines or did Mr. Hammond?

"A. Mr. Hammond.

"Q. Tell the court and the jury, then, what was said at that time, on that occasion, with reference to these vending machines by the defendant?

"A. Well, he started asking me to take them out. I said, 'Well my Lord, you were after me a number of weeks to put them in and they've been in two or three months and why do you want me to take them out?' And, as I recall, he said, 'They are a bunch of crooks and get the machines out.'

"Q. Did you take them out or take any steps to get them taken out?

"A. Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something.

* * * * * * *

"Q. Calling your attention up then to the latter part of June, or the first part of July, had you done anything up to that point, say, the first of July, that—with reference to getting them out?

"A. I'm not sure just when the date was that I went out to see the Moores, but it was around that time, and I'm not sure when it was. It was right around the first of July.

"Q. Did Mr. Hammond say anything to you about—with reference to—to refresh your recollection, that you had talked long enough, that you better have some action on them?

"A. Yes, sir. As I recall, the last conversation I had before I went out to see them, that he told me then, he said, 'We been talking about this for a long time. We are not going to get along, and I mean for you to get these machines out'."

It is this evidence that the State must rely on to support the inciting of the bribery charge as it related to Price. To this the Court of Criminal Appeals responded (the court had already said that *"there is no evidence that Price was incited to pay any money to appellant* [*Hammond*]"): "If appellant, in ordering Price to have the machines removed, was acting out of revenge, or for the self-satisfaction he would receive by punishing the Moores for not meeting his earlier demands, then 'he would not receive anything to which the law would attach value.' However the jury heard the witnesses and observed their

demeanor. They listened to the testimony of the Moores, Price and of the appellant. 'It could properly be found upon the evidence, together with the inferences which need not be necessary or unescapable so long as they are reasonable and warranted that it had been proved beyond a reasonable doubt,' that appellant intended that his threat, transmitted through Price, would cause the Moores to give in and pay him money. . . . Price's action could thus be considered 'a thing of value' to appellant." (Emphasis added.) This is, indeed, a bizarre holding, yet the majority of this court has approved it without saying why.

It must be remembered that Hammond was charged with inciting Price to corruptly offer, promise, or give him $10,000, with intent to influence his vote on a rate case pending before the Public Service Commission. The proof just does not agree with the charge.

It is my opinion that Hammond has been denied due process of law. I am shocked that a "bare minimum standard of evidence to sustain a conviction" rule adopted by the Court of Criminal Appeals, has been approved by a majority of this court. Is one class of defendants subject to the "substantial evidence rule" and holders of a political office subject to the "bare minimum standard" rule? What has happened to that saying, "Equal justice under the law" without regard to that person's persuasion?

I would reverse and remand for a new trial.

Embry, J., concurs.

APPENDIX C

Mailing Address:
P. O. Box 157
Montgomery, Alabama 36101

Telephone: 832-6480

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: SC 2515

Ex Parte: Kenneth Hammond

Petition for Writ of Certiorari to the
Court of Criminal Appeals

(Re: Kenneth Hammond v. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—— Appeal docketed. Future correspondence should refer to the above SC number.

—— Court Reporter granted additional time to file reporter's transcript to and including

—— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

—— Appell.... granted 7 additional days to file briefs to and including

—— Appellant(s) granted 7 additional days to file reply briefs to and including

—— Record on Appeal filed

—— Appendix Filed

—— Submitted on Briefs

—— Petition for Writ of Certiorari denied. No opinion.

—— Application for rehearing overruled. No opinion written on rehearing.

—— Permission to file amicus curiae briefs granted.

J. O. SENTELL
Clerk, Supreme Court of Alabama

APPENDIX D

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 326 (a1-a4) of Title 14, Code of Alabama (1967) provides:

SECTION 326 (a1). DEFINITIONS.

For purposes of this division, the following words and phrases shall have the respective meanings ascribed by this section:

(a) INCITING TO A FELONY. The effort or endeavor by one person to induce, procure or cause another to commit a specific felony.

(b) INCITING TO A MISDEMEANOR. The effort or endeavor of one person to procure or cause another to commit a specific misdemeanor.

SECTION 326 (a2). INCITING TO A FELONY.

Any person who incites to a felony shall be imprisoned in the penitentiary for not less than one nor more than 10 years; provided, however, that, if such person incites

to a felony under circumstances and with results which would render him an aider or abettor in the commission of such felony, he may be indicted, tried and punished as a principal in the commission of such felony or, at the election and choice of the state, he may be proceeded against as a violator of this statute; but in no event shall a person be convicted and punished for the commission of the same criminal act or acts both as a violator of this statute and as a principal in the commission of the felony to which he shall have incited.

SECTION 326 (a3). INCITING TO A MISDEMEANOR.

Any person who incites to misdemeanor must be fined not more than $500.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

SECTION 326 (a4). ARTICLE CUMULATIVE; CRIMINAL SOLICITATION.

This article is intended to be cumulative and supplementary to existing law or laws. It is not intended to supersede either the common law or any penal statute now in force. The common law offense of criminal solicitation shall continue to be recognized in this state.

Section 63 of Title 14, Code of Alabama (1943) provides:

SECTION 63. BRIBERY OF EXECUTIVE, LEGISLATIVE OR JUDICIAL OFFICERS.

Any person who corruptly offers, promises or gives to any executive, legislative or judicial officer or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or

after he has been qualified, any gift, gratuity or thing of value, with intent to influence his act, vote, opinion, decision or judgment on any cause, matter or proceeding, which may be then pending or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than 10 years.

Section 247 of Title 15, Code of Alabama (1940), provides:

SECTION 247. STATEMENT OF MEANS OR INTENTS IN ALTERNATIVE.

When the offense may be committed by different means or with different intents, such means or intents may be alleged in the same count in the alternative.

APPENDIX E

The State of Alabama
Montgomery County

Circuit Court of Montgomery County, *August* Term, A.D. 1975

Count I

The Grand Jury of Said County charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Bribery of an executive, legislative or judicial officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore, or Charles Price to corruptly offer, promise or give to an executive, legislative or judicial officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, after his election to said office, a gift, gratuity or thing of value, towit: money or proceeds from or in connection with operation of certain vending machines in, towit: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of, towit: $10,000 with the intent to influence the act, vote, opinion, decision or judgment on a cause, matter or proceeding then pending or which may be by law brought before the said Kenneth Hammond in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges

for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

Count II

The Grand Jury of said County further charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, did unlawfully incite, towit: John Moore, Rex Moore or Charles Price to a felony, towit: Attempt to bribe or corruptly solicit a public officer, in that the said Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond induced, procured or caused, or made an effort or endeavor to induce, procure or cause the said, towit: John Moore, Rex Moore or Charles Price to corruptly solicit or attempt to solicit or influence a public officer, towit: Kenneth Hammond, President, Public Service Commission, State of Alabama, by promising or agreeing to pay to the said Kenneth Hammond, a sum of $10,000, from or in connection with operation of vending machines in South Central Bell Telephone Company buildings, Montgomery, Alabama, to influence his official action as President, Public Service Commission, State of Alabama, to wit: with regard to official matters or causes pertaining to South Central Bell Telephone Company, a utility company regulated by the said Public Service Commission, contrary to law and against the peace and dignity of the State of Alabama.

Count III

The Grand Jury of said County further charge that, before the finding of this indictment, Kenneth Hammond, alias Ken Hammond, alias "Bozo" Hammond, whose true name is unknown otherwise than stated, a legislative, executive or judicial officer,

towit: President, Public Service Commission, State of Alabama, did corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to make a gift of, towit: Money or proceeds from or in connection with the operation of certain vending machines, in towit: South Central Bell Telephone Company buildings, Montgomery, Alabama, in the amount of towit: $10,000, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding which was pending or may be by law brought before him in his official capacity as President, Public Service Commission, State of Alabama, towit: a telephone rate or charge increase requested by South Central Bell Telephone Company styled, towit: South Central Bell Telephone Company, Petitioner: Petition for Approval of New Schedules of Rates and Charges for Intrastate Telephone Service, Alabama Public Service Commission Docket 16966, contrary to law and against the peace and dignity of the State of Alabama.

/s/ JAMES H. EVANS
District Attorney, Fifteenth
Judicial Circuit of Alabama

/s/ WILLIAM G. BAXLEY
Attorney General, State of Alabama

IN THE

Supreme Court of the United States

NO. 77-1548

KENNETH HAMMOND,

Petitioner,

VS.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIAM J. BAXLEY
Attorney General of Alabama

JAMES S. WARD
Assistant Attorney General
of Alabama

ED CARNES
Assistant Attorney General
of Alabama

ATTORNEYS FOR RESPONDENT

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IN THE

Supreme Court of the United States

NO. 77-1598

KENNETH HAMMOND,

Petitioner,

VS

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported as *Hammond v. State,* in Ala. Cr. App., 354 So.2d 280 (1977). Petition for Writ of Certiorari, upon preliminary examination, was granted by the Alabama Supreme Court on June 22, 1977. After the submission of briefs and oral argument, the Alabama Supreme Court, without opinion, quashed the writ as *improvidently granted* on December 16,

1977. This judgment and order of the Alabama Supreme Court is reported as *In re Hammond v. State of Alabama* in Ala., 354 So. 2d 294 (1977).

JURISDICTION

The petitioner has applied to this Honorable Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals rendered on March 1, 1977.

Petitioner applies for this Writ of Certiorari pursuant to 28 U.S.C., §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent submits there are no constitutional provisions involved because none of petitioner's constitutional rights were in any way denied, abridged, infringed or violated, either at the trial or appellate level in Alabama. Consequently, this Honorable Court would not have jurisdiction to review the judgment of the Alabama Court of Criminal Appeals nor would petitioner have any claim of entitlement to that review.

Be that as it may, petitioner alleges that the following constitutional and statutory provisions are involved:

The Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. §1257(3) which provides in pertinent part:

> State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

Section 13-9-40, Code of Ala. 1975, which provides:

> *Definitions.*
>
> For purposes of this division, the following words and phrases shall have the respective meanings ascribed by this section:
>
> (1) INCITING TO A FELONY. The effort or endeavor by one person to induce, procure or cause another to commit a specific felony.
>
> (2) INCITING TO A MISDEMEANOR. The effort or endeavor of one person to procure or cause another to commit a specific misdemeanor.

Section 13-9-41, Code of Ala. 1975, which provides:

> *Inciting to felony.*
>
> Any person who incites to a felony shall be imprisoned in the penitentiary for not less than one nor more than 10 years; provided, that, if such person incites to a felony under circumstances and

with results which would render him an aider or abettor in the commission of such felony, he may be indicted, tried and punished as a principal in the commission of such felony or, at the election and choice of the state, he may be proceeded against as a violator of this statute; but in no event may a person be convicted and punished for the commission of the same criminal act or acts both as a violator of this statute and as a principal in the commission of the felony to which he shall have incited.

Section 13-9-42, Code of Ala. 1975, which provides:

Inciting to misdemeanor.

Any person who incites to misdemeanor must be fined not more than $500.00 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months.

Section 13-9-43, Code of Ala. 1975, which provides:

Division cumulative; criminal solicitation.

This division is intended to be cumulative and supplementary to existing law or laws. It is not intended to supersede either the common law or any penal statute now in force. The common-law offense of criminal solicitation shall continue to be recognized in this state.

Section 13-5-30, Code of Ala. 1975, which provides:

Executive, legislative, judicial or municipal officers—Offering to such officers.

Any person who corruptly offers, promises or gives

to any executive, legislative or judicial officer or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or after he has been qualified, any gift, gratuity or thing of value, with intent to influence his act, vote, opinion, decision or judgment on any cause, matter or proceeding, which may be then pending or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than 10 years.

Section 15-8-50, Code of Ala. 1975, which provides:

Allegation of different means or intents.

When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative.

QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Was petitioner's conviction of Inciting a Felony, to wit: Bribery, amply and sufficiently supported by competent evidence so as to preclude any violation of his rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and consequently preclude relief from this Honorable Court.

STATEMENT OF THE CASE

The petitioner was indicted by the Montgomery County Grand Jury in a three count indictment on August 8, 1975. Count One charged petitioner with Inciting to a Felony, to wit: Bribery; Count Two charged petitioner with Inciting to a Felony, to wit: Attempted Bribery; and Count Three charged petitioner with Acceptance of a Bribe (R. 1-4). At the close of petitioner's evidence, he moved to require the State to elect which count of the indictment upon which it relied. The State elected Count One and petitioner's case went to the jury on that Count. Consequently, only that Count and the overwhelming evidence supporting it are pertinent for purposes of this discussion. Count One is set out in pertinent part in petitioner's Petition (p. 3) and in the Alabama Court of Criminal Appeals' opinion at *Hammond v. State*, Ala. Cr. App., 354 So.2d 280, 287-288 (1977).

Petitioner attacked the sufficiency of Count One and the allegations contained therein by filing, prior to trial, a Plea in Abatement (R. 19-21); Motion to Quash the Indictment (R. 23-31) and a Demurrer (R. 37-39). In these motions Petitioner attempted to show that Count One and its allegations failed to adequately apprise him of the nature of the offense charged and that the same failed to sufficiently charge an offense. After lengthy pretrial hearings on these motions, (R. 81-A—314-A), they were all overruled and denied by the Montgomery County Circuit Court Judge. (R. 314-A—316-A). On direct appeal to the Alabama Court of Criminal Appeals petitioner raised as error the trial court's denial of these motions. The Alabama Court of Appeals, after oral argument and the submission of briefs, disagreed as they affirmed petitioner's conviction. *Hammond v. State*, Ala. Cr. App., 354 So.2d 280 (1977). Likewise, the

denial of these motions was raised as error on certiorari to the Alabama Supreme Court. They were as unimpressed as the Court of Appeals in that, after hearing oral argument and the submission of briefs, the writ was quashed by the Court as improvidently granted. *In re Hammond v. State of Alabama*, Ala. 354 So.2d 294 (1977). Petitioner, for a fourth time, again tries to convince a Court that it was error for these motions, as they relate to Count One and its sufficiency, to be denied.

As this Honorable Court well knows, crimes involving the betrayal of the public trust and base deceit often involve more elaborate schemes and connivance on the part of the accused than other crimes. Bribery itself, by its very nature, lends itself to conduct which is by necessity more vulgar, perverse and convoluted. Petitioner, because he lowered himself to devise, plan and carry out his most nefarious plan, should not now be able to benefit by accusing the prosecution of presenting "widely disparate and complex factual transactions." (Petition for Writ of Certiorari, p. 4). The State must take such despicable criminal conduct as it finds it. Petitioner made his bed, he should now be forced to lie in it.

Be that as it may, petitioner's scheme was not as disparate and complex as his counsel would now portray. As the evidence to be momentarily elicited below demonstrates, petitioner first "arranged" to be paid money for his efforts in placing vending machines for Tops Vending Machine Company in buildings owned or controlled by a utility, South Central Bell Telephone, which was governed by a governmental commission, the Alabama Public Service Commission, of which he was the elected head, ie. its President.

Petitioner accomplished this by utilizing his influence

over Charles Price, a telephone company assistant superintendent charged with keeping the Public Service Commission content and making sure telephone company rate increases were given favorable treatment. After the representatives of Tops Vending refused to pay for petitioner's "services", he exerted tremendous and constant pressure on Price to threaten the representatives of Tops, Rex or John Moore, to get their "business" straight with petitioner or face the removal of their machines. Petitioner forced Price to be a part of his base scheme by threatening him with an unfavorable and adverse disposition of a *telephone rate increase then pending before petitioner's Commission.* Petitioner did not begin pressuring Price to see the Moores until after the telephone company's rate increase was filed and pending before the Public Service Commission. Here is what the evidence reveals.

Testimony of John Moore

John Moore, a stockholder and the then President of Tops Vending Company (Tops), and his father, Rex Moore, also a stockholder in Tops, (R. 162-163), in late 1973, went to Petitioner for his help in securing the vending machine location and business for a certain South Central Bell Telephone plant in Montgomery, Alabama. (R. 166). Petitioner insisted on 10% of an estimated $100,000 a year volume for his help in placing Tops' machines in telephone company buildings. The Moores refused this "deal". (R. 167) In January of 1975, after having been previously contacted by the telephone company, the Moores were again contacted by a telephone company official who informed them the company had decided to give Tops the contract on the Adams Street (in Montgomery, Alabama) plant. Pursuant to this agreement, the machines were installed. (R. 171).

In April of 1975 John Moore, at the request of his

father, gave petitioner $100.00.

Testimony of Rex Moore

Rex Moore corroborated his son's testimony concerning the 1973 meeting wherein petitioner demanded $10,000 for his efforts in helping Tops place vending machines in telephone company buildings. (R. 305).

In November of 1974, before the machines were actually placed, an official of South Central Bell contacted the Moores and offered them one-half of the vending machine business in a telephone company building. (R. 306) After viewing the location in which the machines were to be placed, Rex Moore met with petitioner. Petitioner demanded $5,000 for his help in securing the placement of one-half of Tops' machines. Moore refused. (R. 308). Later that day, Moore was called by the same telephone company official who told him the deal was off, telling him he was sorry that he could not see fit to handle fifty percent of the machines as it would have been a profitable adventure. (R. 308). Then, as stated, Tops was given 100% of the vending machine business for the telephone company plant in January of 1975. (R. 309).

After the machines were installed, (January, 1975) petitioner began contacting Rex Moore on a frequent and continual basis. (R. 310) Each time petitioner called or met Moore, he would demand money. Petitioner initially wanted his money in a lump sum. Now he asked for his money to be paid on a monthly basis, as a stipend out of the monthly vending machine intake. (R. 312). Rex Moore said the reason petitioner now wanted monthly payments was because he could not come up with the lump sum "front" money petitioner originally demanded. (R. 312). From January of 1975, Moore one time personally gave petitioner $100.00 and one time gave him $100.00 through his son. (R. 313).

Several months after the machines were installed, Charles Price, a telephone company assistant superintendent, came to see the Moores for the purpose of getting them to remove their machines from telephone company buildings. (R. 314)

In July, 1976, Rex Moore again met petitioner. At this meeting, petitioner talked about the Moores paying him a lump sum of $10,000 as petitioner had first proposed in 1975. (R. 319). He pushed Moore for a deal, inquiring what the gross of the machines would be because he wanted ten percent. (R. 354). Petitioner told Moore that he had lived up to his part of the deal and Moore needed to live up to his. (R. 354). After dissuading him of any possibility of paying him $10,000, petitioner again demanded a monthly stipend of $200-$300 a month. (R. 354-355). Petitioner had gotten the machines in, he now wanted his graft.

Left out of the Petition is the fact that this very damaging conversation between petitioner and Rex Moore was taped and then transcribed, both the tape and transcript being introduced and received into evidence.[1]

Testimony of Charles Price

Charles Price, an Assistant Superintendent with South Central Bell, had known petitioner for six to eight years. Petitioner approached Price and asked his help in placing

[1]Petitioner objected to the introduction of the tape and transcript at trial. On appeal, petitioner raised as error, citing both federal constitutional and state law grounds, the introduction of the tape and transcript. The Alabama Court of Appeals held that no error occurred in their introduction and receipt into evidence. **Hammond v. State**, Ala. Cr. App. 354 So. 2d 280, 292-294 (1977). These same grounds were again strenously raised on certiorari but that writ was quashed as improvidently granted. **In re Hammond v. State**, Ala. 354 So.2d 293 (1977).

some vending machines in telephone company buildings for some of his friends. Every time he saw Price, petitioner brought this subject up. (R. 386) Price called the district plant manager and asked him to talk with Tops about the possibility of placing half of Tops' machines in one of the telephone company's plants. (R. 386) The district manager called Tops and made the previously alluded to proposition concerning half the machine business for Tops. (R. 388). Price notified petitioner of this proposition, petitioner in turn calling Rex Moore to discuss the deal.[2] (R. 388). Price was aware that Tops' machines were eventually placed in the telephone company plant. (R. 388).

Several months after the machines were installed, approximately in April of 1975, petitioner told Price he wanted the machines removed. Price was puzzled in that for months petitioner asked him to get them placed but once installed, and only for a few months at that, petitioner began to pressure him to take the very same machines out. (R. 390). Price did nothing about this at first. However, petitioner began to exert considerable pressure on Price to remove the machines, that it became obvious to Price that petitioner was "pushing pretty hard", Price eventually realizing that he needed to do something about the matter. (R. 390).

Petitioner began exerting pressure on Price in April of 1975. In February of 1975, February 5, 1975 to be exact, South Central Bell had filed a rate increase with the Alabama Public Service Commission of which petitioner was President. (R. 391). *Consequently, there was a rate increase pending before the Alabama Public Service Commission when petitioner, President of the Alabama Public Service Commis-*

[2]This call came on the day Rex Moore went to inspect the plant, the call leading to the meeting between Moore and petitioner wherein the $5,000 up front money was discussed. (R. 307-308).

sion, began pressuring Price about the removal of the machines. (R. 391).

Specifically, petitioner told Price, "We've been talking about this for a long time. We are not going to get along, and I mean for you to get these machines out." (R. 392) Petitioner went on further to tell Price that, "We are not going to get along and you are not going to get what you need." (R. 353). This was obviously in reference to the rate increase then pending before the Public Service Commission filed by Price's employer.

Additionally, Price was told by petitioner that the telephone company would not get what it needed unless the Moores lived up to their agreement. (R. 398). Price knew his company had at stake a rate increase pending for fifty-nine million dollars and if the company had a commissioner mad at them they would not know whether they would get a fair hearing or not. (R. 397).

After these obvious threats were conveyed to him, Price went to see the Moores, this occurring around July 1, 1975. Price told the Moores that he did not know what the problem was between them and petitioner but petitioner was on his back to take the machines out. He told the Moores for them to get their problems settled with petitioner because he did not want to take the machines out. (R. 394).

Price met again with the Moores a few days later. He again told them he was sorry and that he did not want to take the machines out because he knew they had a big investment, *but that his company had a big investment and there was a lot at stake for his company* and the Moores. He told them they needed to get with petitioner and solve whatever problems they had. (R. 396-397). Importantly enough, hearings on the pending increase were to resume shortly after Price's meetings with the Moores. (R. 396).

After seeing the Moores, Price reported to petitioner that he had talked with the Moores and that they would be in touch with him. (R. 422). Petitioner did not respond by telling Price to have the machines removed, rather he expressed satisfaction that the Moores were going to get in touch with him. (R. 433).

Price did not doubt for a minute that petitioner meant the rate increase in his threats to him about him not getting or the telephone company not getting what it needed. (R. 402, 428). Price regarded petitioner's statements as threats, especially when he began to pressure him more and more (R. 405, 428). Price was concerned because the rate increase was pending and the telephone company could not afford a mad commissioner. He wanted to keep petitioner happy. (R. 410-411, 429).

Testimony of Petitioner

Petitioner admitted that as President of the Alabama Public Service Commission he had a lot of power over those whom the Commission regulated. (R. 591) Beside rate increases, petitioner acknowledged that there were numerous other areas and matters involving South Central Bell that required the Public Service Commission's approval. (R. 594) Petitioner admitted that the rate increase was pending when he talked to Price about the vending machines. (R. 594).

Petitioner admitted talking repeatedly with the Moores about placing vending machines in the Adams Avenue telephone plant. He even went to Moores' office on three occasions to discuss with them the possibility of helping them

get the vending machines installed. (R. 603-605). Petitioner was even given $100.00 by Rex Moore during January, 1975, the same month in which the machines were installed. Petitioner accepted this money.[3] (R. 607-610).

As mentioned, petitioner and Rex Moore's conversation on July 8, 1975 was taped. Petitioner admitted that the tape and transcript were correct. (R. 576, 627). He admitted recognizing his voice on the tape. (R. 627). During the trial, petitioner admitted making the following statements to Rex Moore, all of which are on the tape:

1. Petitioner admitted that he remembered Rex Moore saying to him, "Well, if you ain't threatened me, I don't know what the hell its been then." (R. 622-623, A10-A11).

2. Right after that remark petitioner admitted saying to Moore, "All I'm trying to do is business with you." (R. 623, A11).

3. Petitioner admitted that Rex Moore then said to him, "I've told you I'm in bad shape, I've told you that not one time, I've told you that a thousand times" to which Hammond admitted responding, "Physically or otherwise." (R. 624, A12). When Moore then responded with "Huh", petitioner admitted saying to him, "Physically or financially, or what." (R. 624, A12). Petitioner admitted Rex then said, "Financially, I've told you that." (R. 625, A12).

4. Petitioner admitted Moore then said, "Well, it's, it's

[3]Interesting enough, petitioner maintained that Moore had agreed to give him $200.00 per month for his help in getting the machines placed. In January of 1975, petitioner saw Rex Moore and asked him for some money. Moore said he would give him $200.00 and petitioner was expecting this amount. However, Moore only gave him $100.00 (R. 614-615).

everytime I turn around, now, its started on my boys now, and I've gone just as g.d. far as I'm going to go." (R. 625, A12). Petitioner admitted then saying, "I don't reckon I've said anything to your son. He came out here one day and he was supposed to have brought me two hundred dollars, and brought me a hundred dollars. That's the only thing—that's the last time I've seen him." (R. 625, A12, A13).

5. Petitioner admitted saying to Rex Moore that the envelope given to him by John Moore only had $100 in it and asked Rex Moore if he remembered giving him (Petitioner) a hundred dollars at the pool hall when he (Petitioner) was heading north. (R. 626, A13).

6. The following was read to petitioner from the tape as being said by him: "Let's go back and look at the situation . . . See what happened, you remember when you first called me in '73, me and you went out there . . . Your son went with you one time, you were talking about ten or twelve, if the volume was. . . ." Although read to him, petitioner stated he could not recall whether he said it or not. (R. 628-629, A14). Petitioner then admitted saying, "That deal never developed, do you follow me?" (R. 629, A15).

7. Petitioner admitted saying: "No, I just want to get the whole story out and let you see the general background. Then I talked to you in December before I went to San Diego on that trip and then there was a hold up." (R. 631, A15). Petitioner admitted Rex Moore then said, "I told you I didn't have no money." (R. 631, A15-A16). Petitioner admitted saying next that, "No, there was a hold up on them going in—remember." (R. 631, A16). Rex Moore then said, "You held them up." (R. 631, A16). However, after admitting the foregoing petitioner could not recall saying the following state-

ment read to him from the transcript of the taped conversation on July 8, 1975: (R. 632, A17)

"Rex Moore: You held them up.

Petitioner: Yeah, because we couldn't reach any agreement." (R. 631, A16).

8. Petitioner stated the following from the transcript could be correct:

"Rex Moore: That's right."

Petitioner: "Yeah, because we couldn't reach any agreement. I was wanting to reach an agreement before I went to San Diego and we didn't." (R. 633, A17).

9. Petitioner admitted saying to Moore:

"Okay. Then we come back from San Diego, prior to going out there, the question came up, half of it or all of it. We are discussing the better half and you were right, you said if you got that half, they would give you the other half, and you hit that button on the head, So, at that particular time, we were saying for that first half, two hundred dollars." (R. 634, A17).

10. Petitioner admitted the following:

"Rex Moore: I didn't hear anything from you at that time, me and you left down there, in that steak and egg place, and when I got home you called the man. He said, 'I'm sorry you didn't want the other

half.' And the next time I heard, from the phone company, not from you, from the phone company, and said, 'Put the machines in.' Now, whether you had that done or not, I don't know whether you had it done or not." (R. 635, A18,A19).

Petitioner: "You told me the second half would come in and it did. They told me that, they told me exactly when it happened. All of 'em is involved in the same company, and the same situation as you know. Now, we were talking about at that time for a half, we would gather in here, back and forth, every month." (R. 635, A19).

Petitioner then admitted he immediately said, "Then, we narrowed it down, agreed on the two hundred." (R. 636, A19-A20).

11. Petitioner continued by admitting he said the following:

"Well, I don't know whether I've squeezed you too damn much, if you don't make two hundred dollars, that's a hell of a squeeze." (R. 637, A20).

12. Petitioner stated he could not remember the following excerpt from the transcript of his conversation with Moore:

"Moore: Well, I mean, you know to come out and say you either going to take them out or do this, that and the other, I just want to know that one way or the other." (R. 637, A20).

Petitioner: "It's your business, if you want, the proposition is there, now, understand this." (R. 637, A20).

13. Petitioner stated he did not recall the following excerpt from his taped conversation with Moore:

"Moore: You want 'em out." (R. 639, A21).

Petitioner: "I moved them in, I feel like they've been in long enough for you to see the volume, and you know the kind of business you are doing." (R. 639, A21).

Finally, petitioner could not remember and did not know whether he made the following statements to Rex Moore, even though said statements were on the tape and were transcribed and were read to him at trial:

"Petitioner: If you are losing money, I'm sorry. (R. 642, A22).

Petitioner: But the only thing I can say, is this, that those blank are in. (R. 642, A22).

Petitioner: You've been in there long enough, and in fairness for you to see what the volume is. (R. 642, A22).

Petitioner: And to see what is—what is pretty well what's been done and what it hadn't done, and now, if its making a profit. (R. 642, A22).

Petitioner: I'll feel like if you want to be fair in it, and we could come up with some agreement on it. (R. 643, A22).

Petitioner: You know you say you got problems, well, I have, too, we all have. (R. 643, A23).

Petitioner: You got to keep this in mind, Rex, that

you wanted them in, we got them in, you wound up doing all the volume of business. (R. 643, A23).

Petitioner: You would come, you would—and then, and Moore—I sure would. (R. 643, A23).

Petitioner: And stuff, and January, around the 18th or 20th, February, March, April, May, June, they beer there a full five months plus. (R. 643, A23).

Petitioner: My automobile last year, you agreed to to tell me how the volume was doing. (R. 644, A23).

Petitioner: Our main problem, I don't know what your other machines are doing, I couldn't care less. (R. 644, A23).

Petitioner: But I think this is sound business and we had an agreement on it. I think it's time to see where we stand. Now, then, if—if you got problems otherwise, I don't think you need to let our agreement get drug into the other thing. (R. 644, A23,A24).

Petitioner: If you feel like I've mistreated you, I'm sorry, I don't see how or why I have. I haven't bothered you that much. (R. 644, A24).

Moore then stated: You've known me a long time. You know g.d. well if I could do it, I would do.

To this Petitioner responded: I don't doubt it. The question is, if you have been there long enough business-wise, and if some understanding can be reached, I think it's time to reach it. (R. 644-645, A24).

Petitioner: If no understanding can be reached—. (R. 645, A24).

Petitioner: Do you feel like, well, I should be compensated any? (R. 645, A24).

Petitioner: I think what the deal is, why you should talk to me, is what we originally agreed upon. (R. 645, A24).

Petitioner: I think if you would, my situation would be this, I think that if you could come to some satisfactory understanding with me. (R. 645, A24).

Petitioner: Now— If you want to try to come to that, then I'm ready." (R. 646, A25).

REASONS OF DENYING THE WRIT

I. *THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT A STATE GRAND JURY INDICTMENT CHARGING THE VIOLATION OF A STATE STATUTE FOLLOW THE DISJUNCTIVE-CONJUNCTIVE PLEADING RULE USED IN FEDERAL COURTS.*

Petitioner was indicted by the Grand Jury of Montgomery County, Alabama, in a three-count indictment on August 8, 1975. Count I of the indictment charged petitioner with inciting another to commit bribery in violation of Title 14, §326(a-l)-(a-2), Code of Alabama 1940 (Recompiled 1958) (1971 Cum. Supp.),[4] and Title 14, §63, Code of Alabama 1940 (Recompiled 1958)[5]. At the trial of the case in

[4]Presently codified as Code of Alabama 1975, §§13-9-40 and 13-9-41.

[5]Presently codified as Code of Alabama 1975, §13-5-30.

Montgomery County Circuit Court, the state elected to go to the jury on Count I only, and petitioner was found guilty thereon.

Count I charges that petitioner unlawfully incited "John Moore, Rex Moore, or Charles Price" to bribe petitioner as President of the Alabama Public Service Commission in connection with a telephone rate increase petition then pending before the Commission. The nature and amount of the bribe is specified, and the specific rate increase petition to be influenced by the bribe is identified by title and by Commission docket number. The allegations of Count I are sufficient to have adequately apprised petitioner of the charges against him and they are sufficient to protect petitioner from being put in jeopardy for the same offense at any subsequent time.

The names John Moore, Rex Moore, and Charles Price are connected in Count I with the disjunctive "or", rather than with the conjunctive "and". Title 15, §247, Code of Alabama 1940 (Recompiled 1958)[6], expressly permits the alternative allegation of different means in the same count of an indictment. According to rules of Alabama pleading, alternatives pled in the same count of an indictment are connected with the disjunctive "or". *See, e.g., Ingram v State*, 241 Ala. 166, 3 So.2d 431 (1941); *Echols v. State*, 35 Ala. App. 602, 51 So.2d 260 (1951); *Bishop v. State*, 19 Ala. App. 326, 97 So. 169 (1923).

Dictum in *In Re Confiscation Cases*, 20 Wall. 92, 87 U.S. 92 (1873), and the holdings in some of the lower federal court cases cited in petitioner's brief concern the disjunctive-conjunctive rule of pleading used in federal courts. Accord-

[6]Presently codified as Code of Alabama 1975, §15-8-50

ing to the requirements of this rule, when a federal statute lists several acts which are prohibited and connects them with a disjunctive "or", they can only be pled alternatively in an indictment by using the conjunctive "and". *E.g., Price v. United States,* 150 F.2d 283 (5th Cir. 1945); *Troutman v. United States,* 100 F.2d 628 (10th Cir. 1938); *O'Neill v. United States,* 19 F.2d 322 (8th Cir. 1927). Although this pleading requirement was apparently originated for the information and protection of the defendant, it has been repeatedly held that proof of any of the conjunctively pled alternatives is sufficient to convict him. *E.g., Turner v. United States,* 396 U.S. 398 (1970); *Crain v. United States,* 166 U.S. 625 (1896); *Price v. United States, supra; Troutman v. United States, supra; O'Neill v. United States, supra.* In other words, for purposes of proof and variance under federal indictments "and" means "or".

The peculiarly inefficacious nature of the purported distinction between "or" and "and" in federal pleadings has not escaped the attention of the commentators. As Professor Wright has noted:

> This pleading distinction offers very little protection to a defendant—and is primarily a trap for the draftsman who uses statutory language without thinking to change an "or" to "and"—in view of the rule that defendant can be convicted if the proper proof shows he has committed the offense by any one of the several means alleged. . . . 1 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Criminal §125, at 240-241 (footnote omitted).

None of the cases cited in petitioner's brief holds that the disjunctive-conjunctive rule of federal pleading is constitutionally mandated. Each of those cases is a case in which a federal indictment or complaint charging the violation of a federal statute was tried in federal court. None of the cases apply the rule to prosecutions in state court, because the rule is merely one of federal court pleading.

Some of the cases do suggest that the original purpose of the disjunctive-conjunctive pleading rule was to provide more information to the defendant about the nature of the charges against him and to provide greater protection to him against the dangers of double jeopardy. The federal rule does not serve either of these objectives any better than the Alabama pleading rule which petitioner attacks. In federal pleadings, when an indictment tells the defendant "and", it really means "or". On the other hand, the disjunctive pleading used in Count I in this case provided petitioner with as much or more information, because when an Alabama indictment tells a defendant "or" it really means it. The four retained attorneys who represented petitioner before and during his trial were experienced Alabama trial lawyers. As their numerous pretrial pleadings evidence, they were quite familiar with the rules of Alabama criminal pleading. They knew petitioner was charged alternatively in Count I of the indictment, and they were thereby informed that petitioner would have to defend on each alternative allegation. If the conjunctive "and" had been used instead of the disjunctive "or", petitioner and his attorneys would not have been any better informed.[7]

Some authorities have noted that the only useful function of the disjunctive-conjunctive rule of federal pleading is that

[7]As a matter of well-established Alabama practice even when the conjunctive "and" is pled, it is construed as being used in the sense of the disjunctive "or". **E.g., Sanford v. State,** 8 Ala. App. 245, 62 So. 317 (1913).

it may somehow increase the double jeopardy protection afforded a defendant. 1 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Criminal §125, at 241; *see also, United States v. Laverick,* 348 F.2d 708, 714 (3rd Cir. 1965). The disjunctive-conjunctive rule of federal pleading does not provide any greater protection against double jeopardy than the method of alternative allegation used in Count I of the indictment in this case. Petitioner cannot be subjected to later jeopardy on any one or more of the alternatives alleged in Count I. The test of former jeopardy scrupulously applied in Alabama courts is whether evidence necessary to sustain a later indictment would have been sufficient to convict under an earlier one. *E.g., Campbell v. State,* 246 Ala. 286, 20 So.2d 878 (1945); *Gandy v. State,* 42 Ala. App. 215, 159 So.2d 71 (1963), cert. den. 276 Ala. 704, 159 So.2d 73, cert. den. 377 U.S. 919. Since proof of any of the three alternatives alleged in Count I would have been sufficient to convict, petitioner is protected from being put in jeopardy on any of the three alternatives in a subsequent indictment.

Petitioner argues in his brief that permitting disjunctive allegations negates the possibility of a fair appellate review, since it is theoretically possible that the jury convicted petitioner on the basis of an alternative which the Alabama Court of Criminal Appeals found not to have been supported by the evidence. Petitioner's brief at 9-10. Such an argument hardly justifies raising the disjunctive-conjunctive rule of federal pleadings to constitutional dimensions. Exactly the same sort of speculation is possible under the federal pleading rule, because proof of any of the alternatives alleged in a single court of a federal indictment is sufficient for conviction. *E.g., Turner v. United States, supra; Crain v. United States, supra; Price v. United States, supra; Troutman v. United States, supra; O'Neill v. United States, supra.*

In the face of this strong federal rule on the sufficiency of alternative proof, petitioner argues that the rule is only applicable to cases in which the indictment alleges different means of committing an offense. Petitioner's brief at 10. The cases petitioner cites do not hold that the rule is inapplicable to alternative allegations of different acts. In fact, *Turner v. United States, supra* at 420, holds exactly to the contrary. In that case, this Honorable Court said:

> The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to anyone of *the acts* charged. [footnote citations omitted] Here the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is irrelevant to the validity of Turner's conviction. . . . (Emphasis added).

In any event, petitioner's attempted distinction between acts in favor of means is irrelevant to this case because, as discussed *infra,* Count I does involve the alternative allegation of different means as opposed to different acts.

Petitioner's argument that the rule in *Turner v. United States,* does not apply when alternatives are alleged in the disjunctive is nothing more than an attempt to exploit the confusing semantics surrounding the federal disjunctive-conjunctive pleading rule. As was discussed *supra,* under that rule the conjunctive "and" really means the disjunctive "or", because proof of any of the alternative allegations joined conjunctively with "and" is in fact sufficient. The prosecu-

tion can obtain a conviction by proving the first alternative alleged, "or" the second alternative alleged, "or" the third alternative alleged. Alabama pleading is different only in the straightforwardness with which the disjunctive "or" is used to mean that either of the alternatives alleged can be proven.

In summary, application of technical rules of federal pleading to this case would not have altered the protection afforded any substantive right of the petitioner. More importantly, the United States Constitution does not require that federal rules of pleading be followed in state courts.

Petitioner also complains about the complexity of what he calls "the ultimate theory of prosecution" in this case. Petitioner's brief at 9. The complexity in this case stems not from any aspect of Alabama law or pleading, but rather from the twisted machinations of petitioner's own corrupt scheme. The petitioner himself involved John Moore, Rex Moore, and Charles Price in a tammany circle of greed which he used to pervert his public trust. He alone is responsible for its complexity.

II. *PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS NOT VIOLATED IN THAT HIS CONVICTION WAS AMPLY AND SUFFICIENTLY SUPPORTED BY COMPETENT EVIDENCE PROVING EACH ELEMENT OF THE CRIME CHARGED AGAINST HIM BEYOND A REASONABLE DOUBT.*

A. Petitioner half-heartedly attempts to argue that he was deprived of the due process of law because his conviction was totally devoid of any evidence. The foregoing State-

ment of the Case unequivocally demonstrates that there was ample and overwhelming evidentiary support for petitioner's conviction. A more detailed and specific discussion of the evidence will result in an even clearer portrayal of the overwhelming evidence of petitioner's guilt and render meaningless the ill-fated and specious argument of the petitioner.

Before looking at this evidence, respondent feels compelled to make some necessary observations. First, the Alabama circuit court judge considered the State's evidence and found it to be sufficient.[8] The Alabama Court of Criminal Appeals reviewed the evidence and also found it to be sufficient to support the verdict. *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 287-289 (1977). Finally, the Alabama Supreme Court quashed the Writ of Certiorari as being improvidently granted after considering the sufficiency of the evidence. *In re Hammond v. State*, Ala., 354 So.2d 294 (1977).

Secondly, we need to quickly dispense with any notion that the Alabama Court of Criminal Appeals, by using the words ". . . bare minimum standards to support the verdict of the jury", *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 291, (1977) deprived petitioner of due process or meant or initiated any lower standard of proof in criminal cases. The obvious import of the words, ". . . bare minimum standards to support the *verdict of the jury*" is that the evidence proved petitioner's guilt beyond a reasonable doubt and to a moral certainty as only that standard of proof and burden can support the verdict of a jury. This interpretation is supported by other parts of the Court's opinion where they talk of

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[8]At the close of the State's case, petitioner moved to exclude the State's evidence which is a proper way in Alabama to question and attack the sufficiency of the State's evidence. Petitioner's motion was denied. (R. 670).

the evidence being sufficient for conviction only if it proved an element beyond a reasonable doubt. *Hammond v. State*, Ala. Cr. App. 354 So.2d 280, 289 (1977). Moreover, when read in context with the preceding sentence, which reads, ". . . The evidence that appellant incited Price to bribe him . . ." is far from overwhelming, the Court was obviously commenting on the *weight of the evidence and its legal sufficiency*, not establishing a new standard of proof or suggesting that only a bare minimum of evidence, less than evidence beyond a reasonable doubt or to a moral certainty, convicted petitioner. Again, the Court was not adopting a bare minimum standard of evidence to sustain a conviction, rather the Court was commenting that the evidence was enough to support the verdict of the jury which must be based on evidence shown to be beyond a reasonable doubt and to a moral certainty.

Thirdly, petitioner relies on the cases of *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961) and *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.654, 80 S.Ct. 624 (1960). Both of these establish the principle that a conviction is void and is violative of due process guaranteed by the Fourteenth Amendment to the United States Constitution if it is totally devoid of evidentiary support. *Thompson v. City of Louisville*, supra, 362 U.S. 199. However, it is important in analyzing these cases to remember that a conviction will be rendered void only where there is no evidence at all. A conviction will not be rendered void where there are only questions concerning the sufficiency of evidence duly presented which tend to prove the crime charged. *Thompson v. Louisville*, supra, 362 U.S. 199. As stated in *United States v. Commonwealth of Pennsylvania*, 316 F.2d 841, 842-843 (3rd Cir. 1963):

"The sole question before us is whether this appeal

is within the rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and *Garner v. Louisiana*, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961). The Court held in these opinions that it is a denial of due process for a state to convict someone upon no evidence of guilt. The Court, however, was careful to point out that '[d]ecision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all' . . . Thus, the pivotal point of our inquiry is whether the conviction of DeMoss rests upon *'any evidence' which would support the finding that he committed the crime charged*. . . ." (Cases omitted) (Emphasis added)

Or as stated in *Grundler v. State of North Carolina*, 283 F.2d 798, 801 (4th Cir. 1960), wherein the Court was discussing *Thompson*, supra:

> ". . . There is a difference between a conviction based upon evidence deemed insufficient as a matter of State criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the State prisoner a remedy in federal court on a writ of habeas corpus."

Likewise, the sufficiency of the evidence does not present a due process question where there is conflicting evidence supporting the conviction. *Talavera v. Wainwright*, 547 F.2d 1238, 1239 (5th Cir. 1977). See also *Sheppard v. Maxwell*, 346 F.2d 707, 737 (6th Cir. 1965); *Moore v. Beto*, 370 F. Supp. 469, 473 (S.D. Tex. 1970) (Due process not violated

as long as there is *some* evidence to support a State criminal conviction. Accord: *United States ex rel Jenkins v. Bookbinder*, 291 F. Supp. 87, 92 (E.D. Pa. 1968) and *United States v. Myers*, 240 F.Supp. 373, 374 (E.D. Pa. 1964).

Since the testimony here shows that there was legally sufficient evidence to support the verdict of the jury, let alone some evidence, petitioner's cases are inapplicable. An even casual comparison of *Garner* and *Thompson* to the instant case easily shows how it is impossible for those cases to be authority for reversing this case. Similarly, a comparison of kindred cases from this Court since *Garner* and *Thompson*, supra, e.g. *Vachon v. New Hampshire*, 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664 (1974); *Gregory v. Chicago*, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946 (1969) to the instant case also easily shows how those cases would be inapplicable.

In closing, we would submit that petitioner's argument is common and frequently advanced, but rarely accepted by the federal courts. See e.g. *Bond v. State of Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976); *Brooks v. Rose*, 520 F.2d 775 (6th Cir. 1975); *Cunhu v. Brewer*, 511 F.2d 894, 898-900 (8th Cir. 1975) cert. den. 432 U.S. 857, 46 L.Ed.2d 83, 96 S.Ct. 108 (1975); *Nolen v. Wilson*, 372 F.2d 15, 18 (9th Cir. 1967), cert. den. 387 U.S. 948, 18 L.Ed.2d 1337, 87 S.Ct. 2085 (1967); *Martinez v. Patterson*, 371 F.2d 815 (10th Cir. 1966); *Moore v. Beto*, supra; *United States ex rel. Hardy v. Brierley*, 326 F. Supp. 364, 370 (E.D. Pa. 1971), aff'd 458 F.2d 38 (1972); *United States ex rel. Flowers v. Rundle*, 314 F. Supp. 793, 794-795 (E.D. Pa. 1970).

One final point before we discuss the evidence. Petitioner briefly and unconvincingly, without any analysis of the

indictment, opines that the indictment alleged three separate factual transactions, each of which are capable of stating a separate offense. Petitioner must adopt this tortured view to get around the well entrenched principle allowing allegations of disjunctive means of committing an offense. This is exactly what occurred here. Count One is merely an example of allegations concerning different means of committing the offense of Inciting a Felony, to wit: Bribery.

The indictment's allegations recognize that the offense could have been committed, and its commission was possible, through the incitement of either Rex Moore, John Moore or Charles Price. Petitioner's incitement could have accomplished through either of the Moores or through Price. The indictment alleged different means, wisely so, to cover the tendencies of the evidence, once adduced. Alleging that the crime could have been accomplished by the incitement of either of the Moores or Price was no different than alleging that a murder was committed by cutting one with a knife or stabbing one with a file. Here, the incitement to a felony, to wit: Bribery, as opposed to the murder, could have been accomplished by inciting either of the Moores or Price, as opposed to accomplishing the murder by cutting with a knife or stabbing with a file.

What made the alternative means possible was the existence of a interrelated scheme involving both the Moores and Price. As the Statement of the Case demonstrated, as well as the evidence to follow, petitioner's dealings with the Moores and Price were not disparate or unrelated to each other. They were inextricably woven to complete a common end: the obtainment of money for help in placing machines. Petitioner's dealing with the Moores was only made meaningful when viewed with his relationship and dealings with

Price, and vice versa. Petitioner's activities with the Moores, and then his activities with Price, must be viewed as parts of a whole, unified and single transaction. This single transaction, like murder being a single transaction, depended on its completion of the incitement of one of three individuals, just as the murder's completion depended on a file or a knife. The fact that at trial the evidence shows a knife was used rather than a file, does not render the indictment bad because of the alternative indictment nor the conviction bad because no evidence showed the use of a file. Likewise, the indictment and conviction here are proper as the evidence eventually showed the means of committing the crime to be the incitement of Charles Price.

B. Petitioner claims there was no evidence whatsoever proving the allegation that he incited Price to bribe him with the intent to influence petitioner's vote on the pending rate increase. The following amply demonstrates the existence of substantial evidence proving this element of the crime.

Price testified that in the last quarter of 1974 petitioner sought his aid in placing the Moores' vending machines in some telephone company buildings. (R. 385-386) After several conversations between petitioner and Price regarding the placement of the Moores' vending machines, Price called the district plant manager and the Moores' machines were, in fact, placed in telephone company buildings in Montgomery. (R. 386-388).

Several months later, the subject of vending machines was again brought up by petitioner. This time, however, he wanted Price to take the machines out. *Petitioner began to talk to Price about getting the machines out only after South Central Bell had filed a rate increase with the Alabama Public Service Commission* (R. 391). (Emphasis added) The rate increase was filed in February of 1975 and petitioner began talking to Price about the machines' removal in April of 1975 (R. 390-391).

Price testified that at first he did nothing to get the machines out. However, Price also testified that petitioner continued to talk to him about removing the machines and that he needed to do something about this problem. As stated by Mr. Price:

> "Q: Did you take them out or take any steps to get them out?
>
> "A: Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something." (R. 390, A2).

According to Price's testimony, Petitioner at first only told him to get the machines out because the Moores were a bunch of crooks (R. 391). At first nothing was mentioned by petitioner about Price's company getting "what it needed." And consequently, at first, Price did nothing about trying to get the machines removed (R. 391).

As a matter of fact, Price did nothing for approximately three months to get the machines removed, even though petitioner talked to him about that very subject each time they met during that period.

Around the first of July, Price testified he finally went to see the Moores (R. 392). Price recalled that immediately prior to this first visit, petitioner told him:

"We are not going to get along and you are not going to get what you need." (R. 393, A3).

Therefore, after being pressured by petitioner for three months and after being told that, "You are not going to get what you need," Price went to see the Moores. *And of importance, almost beyond description, this conversation about Price not getting what he needed took place approximately one week before hearings were to be started concerning Bell's rate increase before the Alabama Public Service Commission, the very agency of which petitioner was President.* (R. 396) (Emphasis added).

It does not end here. There is even more evidence on this element. Petitioner and Price had known each other for six to eight years and Price's duties with South Central Bell included him being the head liaison to and lobbyist with the Public Service Commission (R. 383,385). Therefore, when a rate increase from his company was pending, it was his responsibility to see that it faired favorably with the Public Service Commission. This is an important circumstance in analyzing petitioner's statements about Price not "getting what the company needed." Moreover, there is absolutely no evidence that South Central Bell "needed" anything else or had anything else pending before the Public Service Commission other than the rate increase. Therefore, references to "getting what you need" obviously refer to that rate increase.

It is of paramount importance to note from the above elicited testimony that Price did nothing at first to remove the machines. It was only after petitioner told him "We are not going to get along and you are not going to get what you need" that Price went to see the Moores (R. 393). Up

until that point, petitioner had mentioned nothing about Price "getting what he needed." It is vitally significant that Price reacted only after being told he would not get what he needed. Based on Price's job duties and the pendency of a rate request before the Commission petitioner headed, it is obvious petitioner meant the rate increase. Any question is resolved when it is remembered that the petitioner told Price about him not getting what he needed, for the first time, *only one week before hearings were to begin on the rate increase*. Having failed to persuade Price to go see the Moores by simply asking him to get the Moores to remove the machines, petitioner, timing his base and vile conduct perfectly, had to finally resort to threatening Price regarding the rate increase. Only by threatening destruction to a matter so crucially important to Price and his employer, could petitioner force Price to be the pawn in his avarice game of coercing money from the Moores.

Finally, is another equally telling piece of evidence. As Price openly related, he thought petitioner was referring to the rate increase. From Price's testimony we observe:

> "As I recall, I told the Moores that I was sorry that I didn't want to take the machines out, I knew they had a big investment, *but our company had a big investment, and there was a lot at stake for us* and for them, but they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out." (R. 396-397, A5). Emphasis added)
>
> • • • •
>
> "Well, we did have a rate increase pending for fifty-nine million dollars and if we had a commissioner

that was made (sic) at us, we didn't know whether we could get a fair hearing or not." (R. 397-398, A5).

* * * *

"Q: And you were—you were afraid that some vending machines was going to affect Commissioner Hammond's vote?

"A: Yes, sir." (R. 411, A7).

Because the words "rate increase" were never used does not mean the evidence neglects to prove, in fact, that petitioner incited Price with the intent to influence him on the pending rate increase. Telling Price he would "not get what he needed", certainly is ample proof, beyond a reasonable doubt, that petitioner was threatening Price with an adverse disposition on the rate increase, especially when one considers the same was pending, with hearings to begin on its merits shortly.

In closing, we hasten to add that the Alabama Court of Criminal Appeals certainly felt that petitioner incited Price with the intent to influence petitioner on the pending rate increase. As stated by the Court:

> "It is clear that Price acted on several occasions with the intent to influence appellant's [petitioner's] official actions as such actions related to Bell's business."

Hammond v. State, Ala. Cr. App., 354 So.2d 280, 288 (1977).

C. Finally, petitioner alleges that there was no evidence whatsoever proving that petitioner incited Price to

corruptly offer, promise or give petitioner anything of value. Again, petitioner's contentions are without merit as ample evidence was adduced on this element from which the jury could find petitioner guilty beyond a reasonable doubt. The Alabama Court of Criminal Appeals, as with the element discussed in Part B supra, found that evidence sufficient to support the verdict of the jury existed as to this element. As explained by the *Hammond* Court:

> ". . . However, the jury heard the witnesses and observed their demeanor. They listened to the testimony of the Moores, Price and of the appellant [petitioner]. 'It could properly be found upon the evidence together with the inferences, which need not be necessary or unescapable (sic.) so long as they were reasonable and warranted, that it had been proved beyond a reasonable doubt,' that the appellant intended that this threat, transmitted through Price, would cause the Moores to give in and pay him money . . . Price's action could thus be considered 'a thing of value' to appellant." (Cases omitted).

Hammond v. State, 354 So.2d 280, 289, (1977).

This finding by the Court, after an admitted review of the evidence presented, is enough to preclude any further inquiry into whether evidence existed as to this element. However, unabashedly, the respondent submits the following evidence which abundantly reinforces the Court's conclusion.

As a logical starting point in analyzing the Court of Criminal Appeals' finding relating to Price's actions being a thing of value to petitioner, we must again examine the arrangement and relationship between the petitioner and the

Moores. This arrangement was quite simple. In exchange for his help in getting Tops Vending Machines placed, petitioner wanted a commission or kickback from the Moores. Not only did Rex Moore testify that petitioner wanted money for placing the machines, (R. 305, 308), he stated that after the machines were placed, he began hearing quite frequently from petitioner, who each time wanted money, either in a lump sum or in monthly installments. (R. 310, 312, 313)

Also, it is clear from the taped conversation which occurred between petitioner and Rex Moore at Gowan's Truck Stop on July 8, 1975,, a conversation petitioner admits participating in, that there existed an arrangement between petitioner and the Moores where petitioner was to be paid money (R. 622-632, 631-646). [Petitioner himself admits to the correctness of the tape and transcript of this conversation. (R. 576, 622)].

Moreover, the existence of this arrangement can also be seen from the fact petitioner twice received money from the Moores; both times after the vending machines were placed in the Bell buildings (R. 173, 313).

With this background, we can better understand the significance of petitioner's insistence to Price to see the Moores. Petitioner had repeatedly asked Rex Moore for money after the machines were installed. According to Moore, he asked him about money every time he saw him (R. 310-313). *And it is obvious from Petitioner's testimony and the tape that he expected money.*

Having only secured two payments through his own efforts, petitioner now employed Price to carry out his evil deed. As stated, petitioner had been trying to pressure the Moores to pay him for three months or longer. Therefore,

it is clear that petitioner's intent in sending Price to see the Moores was to get them to pay money. There is no reason to believe that he had any other intention. Why send a man in Price's position to talk to the Moores, and threaten him with unfavorable action concerning his company's rate increase if he did not, just to get some machines removed? Obviously, petitioner intended Price to be a lever to pry money loose from the Moores. If petitioner simply wanted the machines removed, why did he not have Price call the district plant manager who had arranged for the machines placement instead of insulting and threatening Price to go see the Moores directly?

It is obvious that Price interpreted petitioner's conversations with him to mean that petitioner wanted *something* other than the removal of the machines. Further, it is obvious from his testimony that Price was threatening and pressuring the Moores to pay petitioner, that the machines were being used as the pressuring device. This pressure, supplied by Price, certainly was of value to petitioner as he viewed it as a sure way to get his money from the Moores. Price efficiently delivered the message: Pay or get the machines out. As stated by Price:

> "As I recall, I told the Moores that I was sorry that I didn't want to take their machines out, I knew they had a big investment, but our company had a big investment, and there was a lot at stake for us and for them, *but they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out.*" (R. 396-397, A5) (Emphasis added).
>
> "When he got off the telephone, Johnnie Moore and I walked out front, and I told him, I said, 'Look, I don't

know what the problem is between you and Mr. Hammond, but he's on my back to take the machines out. I don't want to take them out, so you all get your problems settled." (R. 394, A4).

It is also obvious from the testimony that petitioner himself did not want the machines removed but instead wanted the Moores to pay him and live up to their agreement. This is demonstrated by the following:

1. Charles Price testified as follows:

"And you say that Mr. Hammond said that you are not going to get what you need or words in effect to that, unless these people do—*live up to their agreement?*

"A: It was words to that effect; yes, sir.

"Q: Mr. Hammond told you that?

"A: Yes, sir." (R. 397-398, A5,A6) (Emphasis added)

2. After Price visited the Moores, he reported back to petitioner. Petitioner did not ask whether the machines had been removed, or whether plans had been made for their removal. Rather, he was pleased when Price told him that the Moores would be in touch with him. As a matter of fact, after he learned the Moores would be contacting him, he no longer insisted that Price remove the machines, obviously thinking that the Moores would now begin to pay him.

Further, not only would the act of the Moores getting in touch with petitioner be completely unrelated to any action

leading to the machines removal, but petitioner expressing satisfaction over that act demonstrates an intent on his part totally inconsistent with his wanting the machines removed or "to get the machines out." As related by Price:

"A: Yes, sir. After I talked to Johnnie Moore, I went back to see Mr. Hammond, and I said that I had talked to Johnnie and they said they would be in touch with you."

* * * * *

"Q: All right. And when you went back and saw Kenneth Hammond after having seen the Moores and told him what you—you told him, you thought Johnnie Moore would be in touch with him, *did Mr. Hammond say then to get the machines out?*

"A: *No, sir, he said, fine.* (R. 422-423, A9) (Emphasis added)

3. No interpretation can be given the testimony of petitioner or the taped conversation between him and Rex Moore at Gowan's Truck Stop on July 8, 1975 other *than that petitioner was expecting the Moores to pay money, not that he wanted the machines removed.* During the taped conversation with Rex Moore, petitioner kept asking about their agreement; that the Moores had had enough time; that petitioner wanted them to live up to their agreement; and that petitioner wanted his money. (See Statement of the Case, testimony of petitioner, supra). It is interesting that petitioner's insistence on money and the Moores' living up to their agreement, which is evident on the tape, occurred only a few days after Price had told petitioner the Moores would be contacting him. It is interesting that the conversa-

tion of July 8, 1975 occurred only a few days after Price went to see the Moores.

Clearly then, the actual events and occurrences that took place demonstrate and prove that petitioner incited Price to corruptly offer, promise or give the petitioner a thing of value. Petitioner pressured Price to see the Moores for the purpose of relaying his threats and intentions to them. As a result of Price seeing the Moores, Price informed the petitioner that the Moores would be contacting him. As a result of Price seeing the Moores, petitioner and Rex Moore met, at least as far as petitioner was concerned, to discuss their prior agreement and the payment of money to petitioner, not the removol of machines. In actuality then, not only did petitioner incite Price to corruptly offer, promise, or give him something of value, that "value" actually materialized when petitioner met Rex Moore to discuss, as far as petitioner knew, illegal payments to him. Consequently, petitioner received something of value from Price.

CONCLUSION

Based on all the foregoing authority, both legal and factual, the State of Alabama, respondent, respectfully submits that there is no merit in any of the contentions raised by petitioner and his Petition for Writ of Certiorari to this Honorable Court ought to be and is due to be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

By:

JAMES S. WARD
Assistant Attorney General of Alabama

ED CARNES
Assistant Attorney General of Alabama

CERTIFICATE OF SERVICE

I James S. Ward, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States hereby certify that on this 8th day of June 1978, I did serve the requisite number of copies of the foregoing Brief and Argument of respondent and Appendix on the Honorable James F. Neal, the Honorable James V. Doramus and the Honorable Thomas H. Dundon, Neal & Harwell, 800 Third National Bank Building, Nashville, Tennessee, 37219, attorneys for petitioner, by mailing said copies to them at the aforesaid address with the postage prepaid.

JAMES S. WARD
Assistant Attorney General of Alabama

250 Administrative Building
Montgomery, Alabama, 36130

APPENDIX A

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing pages numbered 390, 393, 394, 396, 397, 398, 399, 411, 422, 423, 622, 623, 624, 625, 626, 628, 629, 631, 632, 633, 634, 635, 636, 637, 639, 642, 643, 644, 645, and 646, contain full, true and correct copies of those pages of the record on appeal in the cause of Kenneth Hammond, alias v. State of Alabama, Montgomery Circuit Court Number 12359, 3 Div. 444, as the same appear and remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 29th day of May, 1978.

MOLLIE JORDAN
CLERK, COURT OF CRIMINAL APPEALS
OF ALABAMA

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why do you want me to take them out?"

And, as I recall, he said, "They are a bunch of crooks and get the machines out."

Q Did you take them out or take any steps to get them taken out?

A Not immediately, this went on, you know, several times, and finally it got right obvious he was pushing pretty hard and I needed to do something.

Q Now, approximately when did Mr. Hammond start after you to get the machines out? In your best judgment?

A It's back in — in my best judgment and this is trying to think back, I would say probably during April, probably during April of this year.

Q Probably during April. Did he get more and more insistent as time went by and they weren't taken out?

MR. BEATY: We object to that as leading, more and more.

THE COURT: Don't lead your witness.

Q Just tell what all Mr. Hammond would say to you about getting them out?

A Well, first it was just "get them out". And, "They are a bunch of crooks", and then, like I say, really got to where a lot of pressure was put on me until it got obvious if I didn't do something —

MR. BEATY: We object to his interpretation of obvious, that calls for a mental conclusion of this witness

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words to that effect?

MR. BEATY: We object to that as leading, Your Honor, and siggestive. The witness has answered the question, and now —

THE COURT: Ask him what he said.

MR. BAXLEY: All right.

THE WITNESS: The best of my recollection what was said is, "We are not going to get along and you are not going to get what you need." He did say that.

BY MR. BAXLEY:

Q "Or not going to get what you need"?

A. Yes.

Q I'll ask you whether or not Mr. Hammond ever mentioned to you anything about an envelope with regard to Tops Vending Company or the Moores?

A He mentioned one that John Moore had given him.

Q What, if anything, and when was that occasion?

A It was during this same period of time, but I don't recall exactly when it was.

Q What, if anything, did he say?

A He said that John Moore had given him an envelope but there wasn't in it what he was told was going to be in it.

Q That John Moore had given him an envelope but there wasn't in it what he was told was going to be in it.

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Kenneth Hammond said that to you?

A Yes, sir.

Q So, sometime, then, around the first of July, you went to the Tops Vending Company place here?

A Yes, sir.

Q And up to that point, had you ever, to your knowledge, met or seen Rex Moore?

A No, sir.

Q Up to that day, had you ever, to your knowledge, seen Johnnie Moore?

A No, sir.

Q And what happened when you got out to Tops Vending Company?

A Well, I got there and asked for Rex Moore, and was told by one of the men in the office that we was in the hospital. And I asked who was running the place and they said Johnnie Moore was running it and he was there, on the telephone.

When he got off the telephone, Johnnie Moore and I walked out front, and I told him, I said, "Look, I don't know what the problem is between you and Mr. Hammond, but he's on my back to take the machines out. I don't want to take them out, so you all get your problems settled."

MR. SIKES: May it please the Court, we ask that that be stricken as another hearsay statement, it is not in the presence of the

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hearing for a rate increase was going to resume before the Public Service Commission?

A Mr. Baxley, I'm not sure when that date is, it's a matter of record, and I could get it, but I'm not sure when the date was that the hearing started. It was soon after that; yes, sir.

Q I'll ask you if you apologized to the Moores for having taken the machines out, or if they didn't get with Hammond?

A Yes, sir.

MR. BEATY: Now, we object to any conversations between he and the Moores, if the Court please, outside of the presence of Mr. Hammond, and it's hearsay.

THE COURT: I overrule your objection. I will let him testify to what he said and not what the Moores told

him.

MR. BEATY: We except.

THE WITNESS: As I recall, I told the Moores that I was sorry that I didn't want to take their machines out, I knew they had a big investment, but our company had a big investment, and there was a lot at stake for us and for them, but

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they needed to get with Mr. Hammond and whatever their problems were, they needed to get them worked out.

BY MR. BAXLEY:

Q Did you tell them, to refresh your recollection in substance, that you were sorry, but you were caught in a position where it was the financial health of your company against the financial health of Moores' company?

A Yes, sir.

MR. BEATY: We object to that, that's suggesting a different answer.

THE COURT: I sustain the objection. You are leading him now.

Q What was at stake for your company?

A Well, we had a rate case —

MR. BEATY: If the Court please, unless he knows, it's not shown that he knows what's at stake, if the Court please.

THE COURT: I'll let him testify if he knows.

MR. BEATY: Yes, sir; if he knows.

A (continuing) Well, we did have a rate case pending for fifty-nine million dollars and if we had a commissioner that was made at us, we didn't know whether we would get a fair hearing or not.

Q And you say that Mr. Hammond said that you are not

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to get what you need or words in effect to that, unless these

people do — live up to their agreement?

A It was words to that effect; yes, sir.

Q Mr. Hammond told you that?

A Yes, sir.

Q And that was within a matter of days, before you went out to see John Moore the first time?

A Yes, sir.

MR. BAXLEY: Your Witness.

MR. SIKES: Let's have a minute, please, judge.

THE COURT: I'll give you five minutes. (At this time there was a short recess.)

CROSS EXAMINATION

BY MR. SIKES:

Q Mr. Price, you testified that you are Assistant Superintendent of the South Central Bell Telephone Company?

A Yes, sir.

Q To whom do you report?

A Ben Brown.

Q Would you tell the ladies and gentlemen who Mr. Ben Brown is?

A He is vice president of Alabama.

Q Does that mean he heads up the Alabama operation?

A Yes, sir.

Q All right, sir. He's as high up as you can get

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in Alabama?

A Yes, sir.

Q Your duties, as I understand it, as a public affairs expert, is the liaison with all branches of government?

A Yes, sir.

Q Not just the Public Service Commission?

A No, sir.

Q You testified, as I understood it, Mr. Hammond made

a request of you regarding the vending machines at the South Central Bell plant facility between Adams and Washington Street here in Montgomery?

A Yes, sir.

Q Made other requests of you, has he not?

A Has he made other requests?

Q Yes, sir.

A Yes, sir.

Q In fact, frankly and often, hasn't he?

A Yes, sir. Right often.

Q About all kinds of things having to do with the telephone company; is that not correct?

A Yes, sir.

Q Would that also be correct insofar as Commissioner MacDaniel is concerned?

A She has made some requests.

Q All right. Would that be correct so far as Commissioner Zeigler is concerned?

A Yes, sir.

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the Public Service Commission that concern me.

Q And you wanted to keep Commissioner Hammond happy?

A Yes, sir.

Q But you didn't even report this to Mr. Brown?

A No, sir.

Q Well, let me ask you this: Was the sixty million dollars of vital concern to your company?

A Absolutely.

Q And you were — you were afraid that some vending machines was going to affect Commissioner Hammond's vote?

A Yes, sir.

Q He never told you that, did he?
A No, sir; he did not.
Q He never inferred that to you either, did he?
A No, he inferred we weren't going to get along, he said that, but — and — and that we won't get what we needed, but he didn't say that he wouldn't vote for the rate increase.
Q All right, sir. Did he ever tell you that he would act against you?
A No, sir.
Q Your company, now?
A I understand.
Q Ever act against your company?
A No, sir.
Q Did he ever tell you he would vote against your company?
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MR. SIKES: Your witness.

REDIRECT EXAMINATION

BY MR. BAXLEY:

Q Let's see, now, Mr. Sikes asked you about insofar as, something about all Mr. Hammond told you was just to get the machines out, I believe; is that correct?
A Yes, sir.
Q Now, when you went to see Johnnie Moore, as you testified, and told him that to straighten up or get settled or whatever it was with Kenneth Hammond or the machines would have to come out, from the time you went to see Johnnie Moore and told him that, until the time that this blew up and you got arrested, did you go back and have any conversations with Kenneth Hammond?
A Yes, sir. After I talked to Johnnie Moore, I went back to see Mr. Hammond, and I said that I had talked to Johnnie and they said they would be in touch with you.

Q All right, sir. Mr. Price, one other thing, when — how long did you say you been working at the phone company?
A About twenty-six years.
Q Twenty-six years. And what jobs did you start at with them?
A I started off working in the plant department, repairing cables, setting poles and went into the commercial department.
Q In other words, you came up through the ranks?
A Actually, I started on the training program, the
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first job was in the plant department.
Q I see. And one other thing Mr. Sikes asked you about, other people making requests. Other people, other public officials, Public Service Commissioners or anybody else made requests of the nature that Mr. Hammond made?
A Probably not as many, if that's what you mean.
Q All right. And when you went back and saw Kenneth Hammond after having seen the Moores and told him what you — you told him, you thought Johnnie Moore would be in touch with him, did Mr. Hammond say then to get the machines out?
A No, sir. He said, fine.
Q Thank you very much.

MR. BAXLEY: No further questions.

RECROSS EXAMINATION

BY MR. SIKES:

Q Mr. Price, let me ask you this, sir: In working your way up through the ranks, I'm sure that your salary has increased through the years?
A Yes, sir.
Q What was the last position you held prior to becom-

ing Public Affairs Liaison officer?

A I was in the North Alabama Division Manager.

Q All right, sir. What was your salary at that time?

MR. BAXLEY: Your Honor, we object to going into all of that. I don't see what relevancy it has on this case.

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said it.

Q And that is when you decided?

A Somewhere along about that time.

Q Now, Kenneth, I want to ask you, if on July the 8th, —

A Uh-huh.

Q — out here at Gowan's, did you recognize your voice on that tape?

A Yes, sir.

Q Did you recognize Rex Moore's voice?

A I did; yes, sir.

Q And Mr. Beaty asked you, he said that transcript was basically correct, I believe; is that right?

A That's right. I didn't keep the transcript very long, I read it and listened to the tape.

Q I'm saying just what you told Mr. Beaty?

A Yes, sir. It's hard to remember everything that took place out there, Bill.

Q No, I'm just asking you what you told Mr. Beaty.

A Yes, sir. I said the transcript was basically correct.

Q You told Mr. Beaty that?

A Yes, sir.

Q And that was July 8th?

A That's when I was taped out there, according to what you all said.

Q And did, I'll ask you whether or not Rex Moore said on that tape, "Well, if you ain't threatened me, I don't know

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what the hell it's been then," do you remember Rex Moore saying that?

A Rex, out there during that time?

Q Do you remember him saying that?

A Bill, he got into that area so many times, and reword it and rephrase it so many times, now —

Q You do remember him saying that in substance, then?

A Yes, sir. I believe that's on there; yes, sir.

Q Right immediately —

A I won't tell you positively.

Q Right immediately after then when he said that, did you then say, "All I'm trying to do is business with you," did you say that?

A If that's on the transcript, and that's what it is interpreted as on the tape, yes, sir.

Q And that's your voice that said that?

A If it's on there, if it's on there and it's — until somebody proves otherwise.

Q Did you go back and start at the beginning?

A Yes, sir.

Q Just to reiterate, and think exactly what took place, just stop and think, did you say that, right at that point?

A Yes, sir; that's right.

Q Did Rex Moore then say, "I've told you I'm in bad shape, I've told you that not one time, I've told you that a thousand times."

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Do you remember Rex Moore saying that to you right then at that occasion?

A He said this time and time after time, and in that old transcript there, and —

Q Do you recall him saying that?

A Yes, and this is when I —

Q Did — did you then immediately right after then, say, "Physically or otherwise?"

A Physically or mentally, I believe.

Q Did you say physically or otherwise, physically or otherwise?

A It could have been physically or mentally.

Q Did you say physically or otherwise?

A Bill, I don't know. You can tell me he said the words on the tape, I can't tell if he —

Q I'm asking you if you can recall?

A I do know the words got involved, physically or mentally.

Q Did he say "Huh?" And then you say, "Physically or financially," or —

A Bill, if it's on there, it — it would have to stand, subject to being correct, until proven otherwise.

Q Did you say that, did you say that, "Physically or financially, or what?"

A I very easily could have said that, sir, because a lot of his time had been spent talking about his health.

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Q And then did Rex say, "Financially, I've told you that"?

A I believe that's correct, yes, sir.

Q And then did you say, "Well —" and then did Moore interrupt you and say, "Well, it's, it's everytime I turn around, now, it's started on my boys now, and I've gone just as g.d. far as I'm going to go"

A Yes, sir. I realized Mr. Moore was saying all this, and I realized the motive behind it.

Q And then did you say, Kenneth, "I don't reckon I've said anything to your son. He came out here one day and he was supposed to have brought me two hundred dollars, and

brought me a hundred dollars. That's the only thing — that's the last time I've seen him"?

A Uh-huh.

Q Did you say that?

A Yes, sir. That's been acknowledged a half a dozen times, Bill.

Q And did you say the envelope was sealed up?

MR. BEATY: If the Court please, this is not proper cross-examination. It — the jury has heard the tape, they heard the transcript, and Mr. Hammond said that this was basically correct. This is not trying to impeach what was on the transcript.

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THE COURT: Are you objecting?

MR. BEATY: Yes, sir, I'm making an objection.

THE COURT: I overrule your objection.

MR. BEATY: We except.

BY MR. BAXLEY:

Q Did you say right then, after that, "The envelope was sealed up and I came in here and got a cup of coffee and opened it up." Did you say that?

A Yes, sir; that's correct.

Q Did you say then this, "You gave me —" something, a word that's unclear — "that night over there at your pool hall, remember, when I was heading north?" Do you remember saying that?

A Yes, sir. And that was covered earlier in our conversation.

Q And did you say the word that was unclear, that can't be heard on the tape, did you say a hundred dollars?

A That's correct. And I think that's when he said he had no knowledge of it.

Q Did he say it?

A He must have been drunk.
Q Did he say —
A If I recall correctly, that's what he said.
Q And did you say, "You gave me that hundred dollars over there, one night me and you was sitting there talking"?
A That's correct.
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A I cannot recall, the only thing that I told you that I said earlier.
Q Can you remember saying that, did you not say it or do you not recall?
A Him out there—

THE COURT: Do you remember saying it, if you don't just say you don't remember.

MR. SIKES: He already did, he said, "I can't recall." The Attorney General keeps going on.

MR. BEATY: The Attorney General keeps badgering him. Your Honor, I know I'll be out of order saying this —

THE COURT: Don't do that. Just if he does remember what you said, as to any particular thing, all you've got to do is say you don't remember.

THE WITNESS: The question again, Bill.

BY MR. BAXLEY:

Q Did you say, did you say you said, "Let's go back and look at the situation," and he said, "All right."

And did you then say, "See what happened, you remembered when you first called me in '73, me and you went out there," and went on to say, "Your son went with you one time, you were talking about ten or twelve, if the volume was —"
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A I don't — I don't recall, Bill.
Q You don't recall whether you said that or not?

A No, sir. I do know that what was supposed to be on there —
Q Just a minute.

MR. BAXLEY: Your Honor. He can say what he wants to for his lawyers, he can just answer the questions.

THE COURT: Just answer the question. If you don't recall, you don't.

THE WITNESS: I know what happened.

BY MR. BAXLEY:

Q Did Moore say, "Said that." And did you say it right then, "That deal never developed, do you follow me?"
A Yes, sir. That's said.
Q Right after you were talking about the ten or twelve, you said that, you said "That deal never developed, do you follow me"?

MR. SIKES: I've been trying to listen to the State Attorney's questions, and I can't understand whether he's saying does the witness recall having said this, or does the witness recall that's on the transcript.

THE COURT: I think he's talking, as I understand it, and you can correct me if I'm wrong,

BY MR. BAXLEY:

Q All right. Then did you go on and say, Kenneth, a little later on, "No, I just want to get the whole story out and let you see the general background. Then I talked to you in December before I went to San Diego on that trip, and then there was a hold up."

Did you say that?

A Yes, sir; I believe that portion is correct.
Q And did Rex say immediately right then, "I told you I didn't have no money."

And did you immediately say, "No, there was a hold up on them going in — remember?"

A I believe possibly that's correct; yes, sir.
Q And did Rex say, "You held them up", and did you immediately right then say, "Yeah, because we couldn't reach any agreement"?
A Bill, if I recall correctly —
Q Kenneth, do you recall saying that, did you not say it, or do you not recall?
A I consider it a business-like approach and —
Q A business-line approach?
A Yes, sir.
Q Well, then, did you say that?
A And —
Q Did you say that, Kenneth?
A I do know the delay was that they didn't negotiate
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properly.
Q Did you say that, Kenneth, or didn't you say it or don't you recall whether you said it or not?
A. Now, read that to me again, Bill.
Q Did you say, "No, I just wanted to get the whole story out and let you see the general background. Then I talked to you in December, before I went to San Diego on that trip and then there was a hold up." And then Rex said, "I told you I didn't have no money." I think you admitted that that was said a while ago, and you said, "No, there was a hold up on them going in." Do you remember, and Moore said, "You held them up."
And then, did you say, "Yeah, because we couldn't reach any agreement"?
A If that portion is on the tape.
Q Did you say that?
THE COURT: Do you remember saying that?
Q Do you recall whether you said it or not, Kenneth?

A So much of the tape is unclear.
Q I'm not asking you what's on the tape, I'm asking you if you said it or not, said it or do you remember whether you said it or not?
A I just don't remember saying it, I'll be honest with you.
Q All right. Did Moore then say, "That's right," after you said, "Yeah, because we couldn't reach any agreement,"
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and did you say, "I was wanting to reach an agreement before I went to San Diego and we didn't"?
And Moore said. "That's right." Do you recall saying that out there?
A Bill, I believe that part, to my knowledge, could be correct.
Q Could be correct. All right.
(At this time there was a short recess.)
BY MR. BAXLEY:
Q Kenneth, right there at that point, when Moore said, "That's right", did you say, "Okay. And then we came back from San Diego —"
A Uh-huh.
Q "— but prior to going out there, the question came up, half of it or all of it. Well, we were discussing the better half. You were right. You said if you got that half, they would give you the other half, and you hit the button on the head"?
A Yes, sir.
Q Did you say that?
A Yes, sir. That's correct, yes, sir.
Q Did you say, "So, at that particular time, we were saying for that first half, two hundred dollars." Talking about two hundred dollars per month?
A That's what he said.

Q No, did you say that, Kenneth, did you say that?
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A Repeat it again, Bill.
Q All of it?
A "That's not two hundred dollars a month, and then what he said on it.
Q Did you say that?
A Read it out.
Q Okay. "Okay. Then we came back from San Diego, prior to going out there, the question come up, half of it or all of it. We were discussing the better half and you were right, you said if you got that half, they would give you the other half, and you hit that button on the head. So, at that particular time, we were saying for that first half, two hundred dollars."
A That's what he had mentioned to me earlier.
Q No, sir. Kenneth, I'm asking you did you say that, or did you not say that or don't you recall whether you said it or not?
A Yes, sir. I believe that's — I said that; yes, sir.
Q You believe you said that. You are talking about two hundred dollars a month, at that point?
A That, why that figure got mentioned is that's what he had said earlier himself.
Q But you said that right there I just quoted?
A Yes, that, that information came from what he said, basically, earlier.
Q Then Moore started talking about the Steak and Egg
539
place, and he said, "I didn't hear anything from you at that time, me and you left down there, on that steak and egg place, and when I got home you called the man. He said, 'I'm sorry you didn't want the other half.' And the next time I heard,

from the phone company, not from you, from the phone company, and said, 'Put the machines in'. Now, whether you had that done or not, I don't know whether you had it done or not."

Do you remember him saying that, right after the two hundred dollars?
A Yes, sir; that's on there, if I recall correctly.
Q And then did you immediately right then say, "You told me the second half would come in and it did. They told me that, they told me exactly when it happened. All of 'em is involved in the same company, and the same situation as you know. Now, we were talking about at that time for a half, we would gather in here, back and forth, every month."

Did you say that?
A Bill, is that directly followed verbatim, the other first part you read?
Q Right. Did you say that then, at that time, or did you not say it or do you not recall it?
A You did not leave any portion of it out?
Q N, sir.
A Will you read it to me one more time, Bill, and I'm not trying to —
Q "You told me the second half would come in and it did,
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they told me that, they told me exactly what happened. Well, all of them is involved in the same company and the same situation as you know. Now, we were talking about, at that time, for a half, we would gather in here, back and forth, every month."
A Well, "gather in here, every month, back and forth"?
Q Did you say that?
A Bill, I believe that's correct; yes, sir.
Q And did you immediately before anybody else said any-

thing, say, "Then, we narrowed it down, agreed on two hundred"?

A I believe that's correct.

Q You said then, "We narrowed it down, agreed on the two hundred"?

A Yes, I believe that's correct, because this is the figure he quoted me.

Q You said that?

A Yes, sir.

Q All right. Now, I'm going to skip over for a while and talk about Frank and Oscar and some money in a tight, and tax people, and at that point, when he's talking about the tax people getting after him, did you say — and he's talking about squeezing —

A Uh-huh.

Q Did you then say, "Well, I don't know whether I've squeezed you too damn much, if you don't make two hundred

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dollars, that's a hell of a squeeze."

A Well, I knew Rex Moore was a con, I knew about his business.

Q I'm not asking you what you knew about Rex Moore, did you say that statement?

A If that's on there, that's what I said; yes, sir.

Q And did he right then at that point, say, "Well, I mean, you know to come out and say you either going to take them out or do this, that and the other, I just want to know that one way or the other." Did you say that right then?

A Bill, I — I don't recall, I'm being honest with you.

Q Did you say right then, at that point, "It's your business, if you want, the proposition is there, now, understand this."

A Uh-huh.

Q Did you say that; it's your —

MR. SIKES: Your Honor, I'm going to pose an objection to that one for this reason, the actual correct quotation, even according to the Attorney General's transcript, which we are not saying is totally accurate, is, By Mr. Hammond: "It's your business, if you want the proposition there, now, I understand this, and er —"

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MR. BEATY: He answered he didn't remember.

MR. BAXLEY: No, he has not answered he didn't remember.

THE COURT: I understood him to answer that he couldn't remember.

MR. BAXLEY: All right, sir.

BY MR. BAXLEY:

Q Well, did you talk a little bit about Pioneer, then, and did Moore say, "You want 'em out?"

And then you immediately say, "I moved them in, I feel like they've been in long enough for you to see the volume, and you know the kind of business you are doing."

MR. BEATY: If the Court please, we want to interpose an objection again. This is not cross examination of what this man said on direct. This is the Attorney General just trying to read in, again, the transcripts that was given to the jury, for them to use for a proper purpose and then take it —

THE COURT: If you are objecting, I overrule your objection.

MR. BEATY: I object. We except.

BY MR. BAXLEY:

Q Ken, did you say that?

A Bill, I'm afraid my answer is going to be to you that,

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Q Kenneth, I'll just ask you this, did you, to shorten matters, did you say, "I moved them in." Did you say that?

A Bill, I don't recall.

Q Did you say, "I feel like they've been in long enough for you to see the volume, and you know what kind of business you are doing," did you say that?

THE WITNESS: Judge, can I get the Attorney General —

MR. SIKES: Just answer that, just sit there and answer the questions as best you can.

A I just don't remember, sir.

Q Did you say, "If you are losing money, I'm sorry"?

A I don't know, Bill.

Q Did you say, "But the only thing I can say, is this, that those blank are in"?

A I don't know, Bill.

Q Did you say, "You've been in there long enough, and in fairness for you to see what the volume is"?

A I don't know, Bill.

Q Did you say, "And to see what is — what is pretty well what's been done and what it hadn't done, and now, if it's making a profit —"

A I don't know, Bill.

Q And did Rex cough?

A I don't know, Bill.

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Q And you continue, "I'll feel like if you want to be fair in it, and we could come to some agreement on it —"

A I don't know, Bill.

MR. SIKES: That's even miscorrectly read, Your Honor. "If we could come up to some agreement on it —"

MR. BAXLEY: I'm sorry, misread the "up".

Q Did you say, "If you want to be fair in it, if we can come up to some agreement on it"?

A I don't know, Bill

Q Something unclear. And did you say before anybody else said anything, "You know you say you got problems, well, I have, too, we all have"?

A I don't know, Bill.

Q Did you say, "You got to keep this in mind, Rex, that er — that aa — you wanted them in, we got them in, you wound up doing all the volume of business," did you say that?

A I don't know, Bill.

Q But you said, "You would come, you would —" and then, something unclear, and Moore said, "I sure would"?

A I don't know, Bill.

Q And then it says, Moore says, "I sure would." Did you say — unclear — and then say, "And stuff, and January, around the 18th or 20th, February, March, April, May, June, they been there a full five months plus." Did you tell him that?

A I don't know, Bill.

Q And, "My automobile last year, you agreed to to tell me how the volume was doing," did you say that?

A I don't know, Bill.

Q Did you say, "Our main problem, I don't know what your other machines are doing, I couldn't care less"?

A I don't know, Bill.

Q Did you say, "But I think this is sound business and we had an agreement on it"?

A I don't know, Bill.

Q Did you say, "I think it's time to see where we stand."

A I don't know, Bill.

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Q Did you say, "Now, then, if — if you got problems

otherwise, I don't think you need to let our agreement get drug into the other thing"?

A I don't know, Bill.

Q A little later on, the conversation, did Rex say, did you say, "If you feel like I've mistreated you, I'm sorry, I don't see how or why I have, I haven't bothered you that much." Did you say that?

A I don't know, Bill.

Q Did he right then, say, "You've known me a long time you know g.d. well if I could do it, I would do"?

A I don't know, Bill.

Q Did you right then say, "I don't doubt it. The question is, if you have been there long enough business-wise, and if

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some understanding can be reached, I think it's time to reach it." This is you talking, did you say that?

A I don't know, Bill.

Q "If no understanding can be reached —" and then trail off, you don't know whether you said that or not?

A I don't know, Bill.

Q Kenneth, later on, did you ask him, "Do you feel like, well. I should be compensated any"?

A I don't know, Bill.

Q Did you ask him how much volume they were doing? And question him about it, Kenneth?

A I don't know, Bill.

Q Did you tell him, "I think what the deal is, why you should talk to me, is what we originally agreed upon"?

A I don't know, Bill.

Q Can you answer, and tell him, "I think if you would, my situation would be this, I think that if you could come to some satisfactory understanding with me"?

A I don't know, Bill.

Q Kenneth, if you said that, what were you talking about?

MR. BEATY: We object to that, he said he didn't know.

THE COURT: He said he didn't know.

MR. BEATY: We object to that.

THE COURT: Well, he's already answered the

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question.

BY MR. BAXLEY:

Q And did he say, "Now, —" and you say, "If you want to try to come to that, then I'm ready"?

A I don't know, Bill.

Q Kenneth, did you tell Charles Price that when you were trying to get him to take the machines out, "I'm just going to tell you, we are not going to get along, you are not going to get what you need, unless these people come through with what they told me they were going to do"?

A I have never threatened Charles Price in any manner, or told him anything of that nature, to my knowledge, sir.

Q I don't mean threaten him. You say you've never told him anything like that?

A No, sir.

MR. BAXLEY: That's all.

REDIRECT EXAMINATION

BY MR. BEATY:

Q Ken, did the A.G. ask you about Mr. Price, is what Mr. Price testified to yesterday at the end of his testimony, did he tell the truth, or did you ever threaten him about the rate increase?

A No, sir, I've never threatened him about the rate increase.

Q Did you all ever discuss the rate increase in any